Supreme Court of the United States

OCTOBER TERM, 1919

No. 11 Original

STATE OF RHODE ISLAND, Complainant

—VS—

A. MITCHELL PALMER, ATTORNEY GENERAL
AND DANIEL C. ROPER, COMMISSIONER
OF INTERNAL REVENUE, Defendants

MOTION TO FILE ORIGINAL BILL

and

ORIGINAL BILL AND EXHIBITS

STATE OF RHODE ISLAND
HERBERT A. RICE
Attorney General

PROVIDENCE:
1919

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Motion to File Original Bill

Now comes the State of Rhode Island, by its Attorney General, Herbert A. Rice, and moves the court for leave to file the bill of complaint herewith exhibited, in a suit between the State of Rhode Island and citizens of other States and arising under the Constitution and laws of the United States, for the purpose of enjoining the defendants from enforcing within the State of Rhode Island such titles and sections of an Act of Congress, commonly called the Volstead Act, as apply and are designed to give effect to the so-called Eighteenth Amendment; and that proper process may issue thereon, notifying the defendants of the filing of said bill and that they appear in answer thereto and defend the same.

STATE OF RHODE ISLAND,
by HERBERT A. RICE,
Attorney General.

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Original Bill in Equity

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States: —

The State of Rhode Island, complainant, brings this bill of complaint, for itself and on behalf of the people of said State, against the defendants above named and respectfully shows unto this Honorable Court:

I. That the State of Rhode Island is one of the States of the United States and that the defendants, A. Mitchell Palmer, is a citizen of the State of Pennsylvania, and a resident of Washington, in the District of Columbia, and is the Attorney General of the United States, and Daniel C. Roper, is a citizen of the State of South Carolina, and a resident of Washington, in the District of Columbia, and is the United States Commissioner of Internal Revenue.

II. That this is a suit in equity of a civil nature by the State of Rhode Island against citizens of other States of the United States, and arises under the Constitution and laws of the United States, especially under Article V of the Constitution and Article X of the Amendments to the Constitution, and is for the purpose of enjoining the defendants from enforcing within the State of Rhode Island such titles and sections of an Act of Congress, commonly called the Volstead Act, as apply and are designed to give effect to the so-called Eighteenth Amendment. This suit is instituted pursuant to a resolution of the General Assembly of the State of Rhode Island. (Exhibit A.)

III. And in support of its bill complainant alleges:

(1) That as a colony, Rhode Island was settled by subjects of the British Crown in 1636, and that said colonists from the beginning exercised and enjoyed the inherent right of self-government, in the management and control of their own affairs as a community and in the establishment of their civil institutions for the protection of the rights and liberties of the individual under and in accordance with the common law so far as the same was applicable to their new conditions and circumstances.

(2) That on March 14, 1643-4, Robert Earl of Warwick, constituted and ordained by an Ordinance of the Lords and Commons, "Governor in Chief, and Lord High Admiral of all those Islands and other Plantations inhabited or planted by, or belonging to any His Majesty the King of England's Subjects, (or which hereafter may be inhabited and planted by, or belonging to them) within the Bounds, and upon the Coasts of America," and the Commissioners appointed in Aid and Assistance of the said Earl, did, by the authority of the aforesaid Ordinance

of the Lords and Commons, "give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth, and Newport, a free and absolute Charter of Incorporation, to be known by the Name of the Incorporation of Providence Plantations, in the Narraganset-Bay, in New England,—Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition; and, for that End, to make and ordain such Civil Laws and Constitutions, and to inflict such punishments upon Transgressors, and for Execution thereof, so to place, and displace Officers of Justice, as they, or the greatest Part of them, shall by free Consent agree unto. Provided nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit." (Exhibit B.) And the General Assembly first organized under said Warwick patent, declared "that the forme of Government established in Providence Plantations is Democraticall; that is to say, a Government held by ye free and voluntarie consent of all, or the greater parte of the free Inhabitants." (Exhibit C.)

(3) That on July 8, 1663, by the Charter granted by King Charles II, the free inhabitants of said Colony were created "a body corporate and politic, in fact and name, by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America," with perpetual succession; and that under said Charter the said Governor and Company and their successors were authorized and empowered "from time to time, to make, ordain, constitute or repeal,

such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet, for the good and welfare of the said Company, and for the government and ordering of the lands and hereditaments, hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same; so as such laws, ordinances and constitutions, so made, be not contrary and repugnant unto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there." (Poore's Constitutions, vol. 2, pg. 1595.) That the colonists of Rhode Island and Providence Plantations, under the liberal provisions of said Charter, possessed, exercised and enjoyed full powers of legislation and self-government in all matters and concerns relating to the internal affairs of said Colony, and so continued in their rights under said Charter and as loyal subjects of the British Crown for more than one hundred years.

(4) That in consequence of the assertion by the colonists of Rhode Island and Providence Plantations that they of right possessed full legislative powers in all matters and concerns relating to the internal affairs of said Colony, and the denial thereof by Great Britain, the said colonists severed their connection with Great Britain and abrogated their allegiance to the British Crown; and on the 4th day of May, 1776, the General Assembly of the Colony of Rhode Island passed "An Act repealing an act, entitled 'An act for the more effectually securing to His Majesty, the allegiance of his subjects, in this his colony and dominion of Rhode Island and Providence Plantations'"; wherein it provided "that in all commissions for officers, civil and military; and in all writs and processes in law, whether original, judicial or executory, civil or criminal, wherever the name and authority of the said

King (George III) is made use of, the same shall be omitted; and in the room thereof, the name and authority of the Governor and Company of this colony, shall be substituted, in the following words, to wit: 'The Governor and Company of the English Colony of Rhode Island and Providence Plantations,'" (Exhibit D); and thereupon the Colony of Rhode Island and Providence Plantations became a free, independent and sovereign State, and succeeded to those public rights, belonging by prerogative to the British Crown or exercised by Parliament, that in any way related or pertained to the government and affairs of said State.

(5) That the State of Rhode Island maintained its right to exercise complete legislative powers over its internal affairs and its existence as a free, independent and sovereign State by force of arms, and at the conclusion of war its freedom and independence was acknowledged by Great Britain in the Treaty of Peace signed at Paris, September 3, 1783. That in March, 1781, said State united with the other American States in a league of friendship for the "security of their liberties" under the Articles of Confederation; that under said Articles the State of Rhode Island did not yield or surrender or delegate any legislative power over its internal affairs and civil institutions, and it was expressly provided by Article II of said Articles of Confederation that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

(6) That by the ratification of the Constitution of the United States by the ninth State, on June 21, 1788, the United States of America under the Articles of Confederation ceased to exist, and the United States of America under the Constitution of the United States came

into being and the government thereof was organized in March, 1789; that upon the dissolution of the United States of America under the Articles of Confederation the State of Rhode Island resumed again its position as a free, independent and sovereign State without association in government with those States which had formed the United States under the Constitution of the United States, or with those States which had then failed to ratify said Constitution of the United States; that the State of Rhode Island continued as a free, independent and sovereign State from the dissolution of the government under the Articles of Confederation on June 21, 1788 until the 29th day of May, 1790, when the people of said State in convention called for that purpose, "by an explicit and authentic act of the whole people", ratified the Constitution of the United States, and said State thereby became the thirteenth State of the United States, and that said act of ratification by the people of the State of Rhode Island was in good faith and with full assurance that said State and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purposes and with the powers enumerated in the several articles of said Constitution, and that all other powers, not delegated nor prohibited to the State of Rhode Island, were reserved to the State of Rhode Island or to the sovereign people thereof.

(7) That although the people of the Colony of Rhode Island abrogated their allegiance to the British Crown on the 4th day of May, 1776, they continued their form of government, as the sovereign people of the State of Rhode Island, upon the basis of the liberal Charter granted to them by King Charles II in 1663, and upon the basis of said Charter continued to possess, exercise and enjoy all the rights and powers of self-government in all

matters and concerns relating to the internal affairs of said State until May 2, 1843, when the people of said State, in the exercise of their sovereign authority, ordained and established a new Constitution of government (Poore's Constitutions, vol. 2, pg. 1603), wherein it was declared that "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all"; and further, that since the ratification of the Constitution of the United States by the people of the State of Rhode Island, on the 29th day of May, 1790, the people of said State, both under the Charter of 1663 and under the Constitution of 1843, have ever possessed, exercised and enjoyed, as of right, and do now possess, exercise and enjoy, as of right, full powers of self-government in all matters and concerns relating to the internal affairs of said State.

IV. And complainant is advised and therefore avers that the Constitution of the United States does not delegate to the government of the United States, nor to the people of the United States, any power of police and economy with respect to the internal affairs of the State of Rhode Island, nor is said power with respect to the internal affairs of the State of Rhode Island prohibited by said Constitution to the State of Rhode Island, but is expressly reserved to the State of Rhode Island and the sovereign people thereof; and further, that neither the power of police and economy with respect to the internal affairs of the State of Rhode Island nor the discretion in the exercise thereof can be bargained away, surrendered, yielded or transferred effectually to bind the people of said State and their posterity, if at all, without "an explicit and authentic act of the whole people" of said State.

V. And complainant is advised and believes, and therefore alleges on information and belief, that the Sixty-fifth Congress of the United States of America at its Second Session begun and held at the City of Washington on Monday, the third day of December, A. D. one thousand nine hundred and seventeen, assuming a power not delegated to Congress by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, and of the rights of the people thereof, enacted a "Joint Resolution Proposing an Amendment to the Constitution of the United States", pretending to submit thereby to the Legislatures of the several States of the United States a so-called Eighteenth Amendment to the Constitution of the United States, whereby it was provided that the manufacture, sale and transportation of intoxicating liquors for beverage purposes within the State of Rhode Island should be prohibited; said "Joint Resolution Proposing an Amendment to the Constitution of the United States" is hereunto annexed, marked Exhibit E and made a part hereof, and reference thereto is hereby prayed.

VI. And complainant is advised and therefore avers that the power exercised by Congress in enacting the said Joint Resolution, pretending to submit thereby to the Legislatures of the several States of the United States the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to Congress by the provisions of Article V of the Constitution of the United States, and the exercise by Congress of the power to enact such Joint Resolution, as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, is not a proposal of an amendment to the Constitu-

tion of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but is an unconstitutional and revolutionary proposal to the Legislatures of the several States of a revision and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a proposal of a valid amendment to the Constitution of the United States and under the form and pretense of complying with constitutional procedure; and further, that the proposal of the so-called Eighteenth Amendment, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

VII. And complainant is advised and believes, and therefore alleges on information and belief, that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was unconstitutional, inoperative and void, on the 28th day of December, A. D. 1917, the Honorable Robert Lansing, Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, forwarded a certified copy of said "Joint Resolution Proposing an Amendment to the Constitution of the United States", Exhibit E, to the Governor of each State of the United States, substantially in the form set forth in Exhibit F, hereunto annexed, and made a part hereof. And that the Governors of the several States of the United States thereafter submitted the so-called Eighteenth Amendment to the Constitution of the United States, as set forth in the Joint Resolution of Congress, Exhibit E, as aforesaid, to their respective Legislatures, and thereafter the Legislatures of three-fourths of the several States of the United States, assum-

ing a power not delegated to said Legislatures by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, enacted resolutions of alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States as submitted by Congress, as aforesaid, under the form and pretense of complying with constitutional procedure provided in the case of a valid amendment to the Constitution of the United States, and thereafter certified copies of the resolution of alleged ratification of the so-called Eighteenth Amendment by the aforesaid Legislatures were forwarded to the State Department of the United States, the certification of the alleged ratification from each State illegally and erroneously setting forth that the so-called Eighteenth Amendment to the Constitution of the United States had been adopted as an amendment to the Constitution of the United States by the Legislature of said State according to the provisions of the Constitution of the United States. (Exhibit G.)

VIII. And complainant is advised and therefore avers that the power exercised by each of the Legislatures of the several States of the United States in enacting an alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to the Legislatures of the several States of the United States by the provisions of Article V of the Constitution of the United States, and the exercise by each of the Legislatures of the several States of the power to enact a resolution of alleged ratification of the so-called Eighteenth Amendment, as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the alleged ratification of the so-called Eighteenth

Amendment to the Constitution of the United States by each of the Legislatures of the several States, as aforesaid, was not a ratification of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but was an unconstitutional and revolutionary proceeding in reference to a revision of and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a ratification of a valid amendment to the Constitution of the United States, and under the form and pretense of complying with constitutional procedure; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

IX. And complainant is advised and therefore avers that the Congress of the United States and the Legislatures of the several States of the United States are the representatives and agents of the people of the United States in proposing and ratifying amendments to the Constitution within the intent, purview and scope of Article V of the Constitution of the United States, and within the intent, purview and scope of the original delegation of powers to the people of the United States under the Constitution of the United States; and that the alleged proposal by Congress, as aforesaid, and the alleged ratification by the Legislatures of the several States, as aforesaid, were not within the scope of the original delegation of powers to the people of the United States and were not within the power and authority of Congress and the Legis-

latures as agents of the people of the United States; and further, that the Congress of the United States and the Legislatures of the several States, as aforesaid, are neither the judges of their respective powers nor of the limitations thereof under the Constitution of the United States.

X. And complainant shows and alleges that the Governor of the State of Rhode Island submitted the proposal of the so-called Eighteenth Amendment, Exhibit E, as aforesaid, to two successive General Assemblies of the State of Rhode Island, said General Assembly being the Legislature of the State of Rhode Island, and both of said General Assemblies refused to enact any resolution in alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, and refused to regard or entertain the proposal of said so-called Eighteenth Amendment to the Constitution of the United States as a valid proposal of amendment, and the General Assembly of the State of Rhode Island has ever asserted and now asserts that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States is not a valid proposal of amendment to said Constitution, and that the General Assembly has no power or authority to ratify or approve said so-called Eighteenth Amendment as a valid amendment to the Constitution of the United States; and further, that the General Assembly of the State of Rhode Island on the 3rd day of April, A. D. 1919, enacted a "Resolution Authorizing and Directing the Attorney General to Commence such Suits and Proceedings, or to take such other steps as may be Necessary for the Purpose of Securing a Determination of the Supreme Court of the United States upon the Question of the Constitutionality of the Action of Congress in Proposing the Eighteenth Amendment to the Constitution of the United

States," a copy of which resolution is hereunto annexed, marked Exhibit A, and made a part hereof, reference thereto being hereby prayed.

XI. And complainant is advised and believes, and therefore alleges on information and belief, that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, Exhibit E, as aforesaid, was unconstitutional, inoperative and void, and although the alleged ratification by each of the Legislatures of the several States of the United States of the so-called Eighteenth Amendment to the Constitution of the United States, Exhibit G, as aforesaid, was unconstitutional, inoperative and void, on the 29th day of January, A. D. 1919, the Honorable Frank L. Polk, Acting Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, made promulgation that said so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, had been ratified by the Legislatures of three-fourths of all the States of the United States, and had become valid to all intents and purposes as a part of the Constitution of the United States; a copy of said promulgation being hereunto annexed and marked Exhibit H, and made a part hereof, reference thereto being hereby prayed.

XII. And complainant is further advised and believes, and therefore alleges on information and belief, that although the so-called Eighteenth Amendment is not a valid amendment to the Constitution of the United States and is inoperative and void, the Sixty-sixth Congress of the United States of America at its First Session begun and held at the City of Washington on Tuesday, the

fourth day of March, A. D. one thousand nine hundred and nineteen, illegally and erroneously assuming that a power had been delegated to Congress by the provisions of the so-called Eighteenth Amendment, passed an act entitled "An Act to Prohibit Intoxicating Beverages and to Regulate the Manufacture, Production, Use and Sale of Highproof Spirits for other than Beverage Purposes and to Insure an Ample Supply of Alcohol and Promote its Use in Scientific Research and in the Development of Fuel, Dye, and other Lawful Industries", herein referred to as the Volstead Act, with the intent and purpose of enforcing the so-called Eighteenth Amendment within the State of Rhode Island, reference to said Act as an Act of Congress being hereby prayed; and that in and by Section I of Title II of said Act it is provided that "intoxicating liquor shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or in and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes", and in and by Section 3 of Title II of said Act it is provided that "no person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquors" within the State of Rhode Island, such alleged offenses and crimes being punishable by heavy fines, imprisonments and forfeitures, as set forth in other portions of Title II of said Act; and complainant is advised and therefore avers that such portion of said Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void inso-

far as the same relates to the manufacture, sale, barter, transport, delivery, furnishing or possession of any intoxicating liquor within the State of Rhode Island, or the making of any of said acts within the State of Rhode Island a crime against the United States, said acts within the State of Rhode Island being lawful and authorized under the constitution and laws of the State of Rhode Island.

XIII. And complainant further shows and alleges that the State of Rhode Island in the exercise of its inherent and exclusive right to manage and control its internal affairs as a separate community and independent State, and to pursue such legislative policy as will provide adequate revenue by developing the resources and encouraging the industries within its territorial limits, has permitted and caused to be legally established within the State extensive and numerous manufacturies for the production of intoxicating liquors for beverage purposes, and that many thousands of dollars are invested therein and in the business of retailing the products thereof, and said manufacturies and business have greatly added to the value of the ratable property within the State; that there are within the State at the present time large quantities of intoxicating liquors that were manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, and said liquors are of great value as ratable property, incapable of estimation, and hitherto have been and now are a considerable source of revenue to complainant; and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhode Island, the extensive business of manufacturing and selling intoxicating liquors for beverage purposes within the State of Rhode Island will be entirely destroyed and the value of the property

especially adapted for use in said business will be greatly depreciated, and the intoxicating liquors now within the State, manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, will become of no value, whereby the revenue to the State from all said property, based upon the valuation thereof, will be seriously impaired, to the great and irreparable injury of complainant.

XIV. And complainant further shows and alleges that under Chapter 123, of the General Laws of Rhode Island, 1909, as amended by Chapter 1740, of the Public Laws of 1919, the material portions of which are hereunto annexed and marked Exhibit I, reference thereto being hereby prayed, the State of Rhode Island, through its municipal subdivisions, grants licenses for the manufacture and sale of non-intoxicating liquors for beverage purposes, said non-intoxicating liquors including "all distilled or rectified spirits, wines, fermented and malt liquors, which contain one per centum and not more than four per centum by weight of alcohol", said non-intoxicating liquors being intoxicating liquors within the intent and meaning of said Volstead Act; and that the State of Rhode Island and its municipal subdivisions have for many years derived and now derive extensive revenue from the fees for said licenses, said revenue amounting to the following sums:

Year.	*Revenue.*
1910	$646,364.84
1911	645,640.72
1912	682,463.56
1913	649,888.48
1914	681,279.80

1915	623,223.52
1916	689,519.00
1917	639,486.48
1918	625,083.52

That complainant has received and now receives one-fourth of all the revenue from all licenses issued in the State of Rhode Island for the manufacture and sale of intoxicating or non-intoxicating liquors for beverage purposes, as aforesaid, and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhode Island all said revenues to the State of Rhode Island and to its municipal subdivisions will be entirely lost, to the great and irreparable injury of complainant.

XV. And complainant further shows and alleges that the so-called Volstead Act provides that the Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants are authorized and directed to enforce such portion of said Act as relates and applies to the enforcement of the so-called Eighteenth Amendment, from and after the date when said so-called Eighteenth Amendment is alleged to go into effect, to wit, on or about the 16th day of January, 1920; and although the so-called Eighteenth Amendment is unconstitutional and void, and although such portion of the so-called Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, it is nevertheless the purpose, intent and threat of said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants to enforce the fines, imprisonments and forfeitures provided in said Volstead Act, as aforesaid, against the people of the State of Rhode Island, on the

ground that the manufacture, sale, barter, transport, delivery, furnishing or possession of intoxicating liquor within the State of Rhode Island is contrary to law and a crime against the United States, although all said acts within the State of Rhode Island are lawful and authorized under the constitution and laws of said State; and further, that the enforcement of the so-called Eighteenth Amendment and of the provisions of the so-called Volstead Act, as aforesaid, as proposed, intended and threatened by the said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants, will deprive the people of the State of Rhode Island of that liberty of self-government in the management and control of their domestic affairs as a community, which it was the very purpose of the Constitution of the United States to secure to them, and will also deprive them in their sovereign capacity of that power of police and economy in the regulation of the civil institutions of said State, adapted for the internal government thereof, which the people of said State have possessed, exercised and enjoyed for nearly three centuries, a power never delegated to the United States, but expressly reserved to the people of Rhode Island by the Constitution of the United States; all of which is to the irreparable injury and damage of the people of the State of Rhode Island, and of this complainant.

Forasmuch therefore as complainant is without remedy at law and its only protection in the premises must arise from the equitable jurisdiction of this Court, wherein is vested the duty and the power to interpret and enforce the provisions of the Constitution of the United States, and to the end that it may obtain the relief to which it is by right in equity entitled,

WHEREFORE, complainant respectfully prays this Honorable Court to grant unto it a writ of subpoena to be directed to the said A. Mitchell Palmer, Attorney General of the United States, and to the said Daniel C. Roper, United States Commissioner of Internal Revenue, the defendants herein named, demanding and requiring them to appear and answer hereto, but not under oath, the answer under oath being hereby expressly waived; and that the so-called Eighteenth Amendment be declared unconstitutional, usurpatory and void; and that such portion of said Volstead Act as applies or relates to the enforcement of the so-called Eighteenth Amendment, enacted by Congress under the assumed authority of said so-called Eighteenth amendment, be declared unconstitutional and void; and that said defendants, their assistants, subordinates, agents and servants, and each and every of them, be enjoined and restrained from in any manner enforcing, or attempting to enforce, or causing to be enforced, the aforesaid provisions of the Volstead Act within the territory of the State of Rhode Island, or from in any manner interfering with the manufacture, sale, barter, transport, delivery, furnishing or possession of intoxicating liquors for beverage purposes within the State of Rhode Island, for or on account of any alleged violation of the aforesaid provisions of the Volstead Act, on the ground or claim that any such manufacture, sale, barter, transport, delivery, furnishing or possession of intoxicating liquors for beverage purposes within the State of Rhode Island is contrary to law; and that complainant may have such other and further relief as to this Court may seem just and equitable in the premises.

STATE OF RHODE ISLAND,
by HERBERT A. RICE,
Attorney General.

STATE OF RHODE ISLAND,

PROVIDENCE, SC.

I, Herbert A. Rice, being duly sworn, depose and say that I am the Attorney General of the State of Rhode Island; that I have read the foregoing bill of complaint and know the contents thereof; that so far as the same are allegations of fact they are true of my own knowledge, and so far as they are allegations upon advice, information and belief, I believe them to be true.

(Signed) HERBERT A. RICE.

Subscribed and sworn to in the City of Providence, in said County and State, this day of December, 1919.

(SEAL) (Signed) J. FRED PARKER,

Secretary of State.

EXHIBIT A

RESOLUTION OF THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND

January Session, 1919

RESOLUTION AUTHORIZING AND DIRECTING THE ATTORNEY GENERAL TO COMMENCE SUCH SUITS OR PROCEEDINGS, OR TO TAKE SUCH OTHER STEPS AS MAY BE NECESSARY FOR THE PURPOSE OF SECURING A DETERMINATION OF THE SUPREME COURT OF THE UNITED STATES UPON THE QUESTION OF THE CONSTITUTIONALITY OF THE ACTION OF CONGRESS IN PROPOSING THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

WHEREAS, there has been proposed by Congress an Eighteenth Amendment to the Constitution of the United States, which amendment has been submitted to the legislatures of the several States, and, according to a proclamation of the Secretary of State, has been ratified by the necessary three-fourths of the States in accordance with the provisions of the Constitution of the United States, which said amendment is as follows:—

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to

the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress"; and

WHEREAS, the State of Rhode Island from the earliest days of its history has fought the battle of human freedom, declaring by legislative act its independence of Great Britain two months before the action taken by the National Congress, and compelling the inclusion in the Constitution of the United States of the first ten amendments constituting the national Bill of Rights, and has never failed to take its stand in defence of constitutional government and in the safeguarding of American liberty, and

WHEREAS, it believes that this attempted amendment of the Constitution by Congress has created the following among other grave questions of constitutional rights, to wit:—in that it does not amend the system of government erected by said Constitution, but completely alters and transforms said system; in that the amendment invests Congress with police powers in the States hitherto exclusively exercised by them, and thus constitutes a revolutionary transformation of the government by reason of the extension of the power of the United States, and a compulsory acceptance by the States of a national police rule to be enforced within their borders; and in that such an amendment is contrary to the spirit and system of the dual form of government erected by the Constitution, and, instead of being a proper amendment to the Constitution, is destructive of it, and

WHEREAS, two successive legislatures of the State of Rhode Island have refused to ratify said Eighteenth Amendment, and,

WHEREAS, it is of incalculable benefit alike to the state and the nation, as well as to every citizen regardless of his individual opinion concerning the subject of prohibition, that there should be a prompt, definite and conclusive determination by the highest courts of the issues involved, that public sentiment thus directed into orderly channels may patiently await the judicial outcome of these proceedings, and sane submission to legal processes be substituted for dangerous unrest.

THEREFORE, be it resolved that the Attorney General of the State of Rhode Island be and is hereby authorized and directed, in the name of the State or otherwise, to commence such suits or proceedings, or to take such other steps as may be necessary in the premises for the purpose of securing as promptly as possible a determination of the Supreme Court of the United States upon the question of the constitutionality of the said eighteenth amendment as promulgated.

EXHIBIT B

WARWICK PATENT

MARCH 14, 1643-4

Whereas by an Ordinance of the Lords and Commons, now assembled in Parliament, bearing Date the Second Day of November, Anno Domino 1643, Robert Earl of Warwick, is constituted, and ordained Governor in Chief, and Lord High Admiral of all those Islands and other Plantations inhabited or planted by, or belonging to any His Majesty the King of England's Subjects, (or which hereafter may be inhabited and planted by, or belonging to them) within the Bounds, and upon the Coasts of

America. And whereas the said Lords have thought fit, and thereby ordained, that Philip Earl of Pembroke, Edward Earl of Manchester, William Viscount Say and Seal, Philip Lord Wharton, John Lord Rolle, Members of the House of Peers. Sir Gilbert Gerrard, Baronet, Sir Arthur Haslerig, Baronet, Sir Henry Vane, junc., Knight, Sir Benjamin Rudyard, Knight, John Pim, Oliver Cromwell, Dennis Bond, Miles Corbet, Cornelius Holland, Samuel Vassal, John Rolle, and Wm. Spurstow, Esqrs., Members of the House of Commons, should be Commissioners, to join in Aid and Assistance with the said Earl. And whereas for the better Government and Defence, it is thereby ordained, that the aforesaid Governor and Commissioners, or the greater Number of them, shall have Power, and Authority from Time to Time to nominate, appoint, and constitute all such subordinate Governors, Counsellors, Commanders, Officers, and Agents, as they shall judge to be best affected, and most fit and serviceable for the said Islands and Plantations; and to provide for, order and dispose all Things, which they shall, from Time to Time, find most advantageous for the said Plantations; and for the better Security of the Owners and Inhabitants thereof, to assign, ratify, and confirm, so much of their afore-mentioned Authority and Power, and in such Manner, and to such Persons as they shall judge to be fit for the better governing and preserving of the said Plantations and Islands, from open Violences and private Disturbances and Distractions. And whereas there is a Tract of Land in the Continent of America aforesaid, called by the Name of the Narraganset-Bay; bordering Northward and Northeast on the Patent of the Massachusetts, East and Southern on Plymouth Patent, South on the Ocean, and on the West and Northwest by the Indians called

Nahiggansetts, alias Narragansets; the whole Tract extending about Twenty-five English Miles unto the Pequot River and Country.

And whereas divers well affected and industrious English Inhabitants, of the Towns of Providence, Portsmouth, and Newport in the tract aforesaid, have adventured to make a nearer neighbourhood and Society with the great Body of the Narragansets, which may in Time by the blessing of God upon their Endeavours, lay a sure Foundation of Happiness to all America. And have also purchased, and are purchasing of and amongst the said Natives, some other Places, which may be convenient both for Plantations, and also for building of Ships, Supply of Pipe Staves and other Merchandize. And whereas the said English, have represented their Desire to the said Earl, and Commissioners, to have their hopeful Beginnings approved and confirmed, by granting unto them a Free Charter of Civil Incorporation and Government; that they may order and govern their Plantation in such a Manner as to maintain Justice and peace, both among themselves, and towards all Men with whom they shall have to do. In due Consideration of the said Premises, the said Robert Earl of Warwick, Governor in Chief, and Lord High Admiral of the said Plantations, and the greater Number of the said Commissioners, whose Names and Seals are here under-written and subjoined, out of a Desire to encourage the good Beginnings of the said Planters, Do, by the Authority of the aforesaid Ordinance of the Lords and Commons, give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth, and Newport, a free and absolute Charter of Incorporation, to be known by the Name of the Incorporation of Providence Plantations, in the Narraganset-Bay,

in New England.——Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any Part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition; and, for that End, to make and ordain such Civil Laws and Constitutions, and to inflict such punishments upon Transgressors, and for Execution thereof, so to place, and displace Officers of Justice, as they, or the greatest Part of them, shall by free Consent agree unto. Provided nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit. And always reserving to the said Earl, and Commissioners, and their Successors, Power and Authority for to dispose the general Government of that, as it stands in Relation to the rest of the Plantations in America as they shall conceive from Time to Time, most conducing to the general Good of the said Plantations, the Honour of his Majesty, and the Service of the State. And the said Earl and Commissioners, do further authorize, that the aforesaid Inhabitants, for the better transacting of their public Affairs to make and use a public Seal as the known Seal of Providence-Plantations, in the Narraganset-Bay, in New-England. In Testimony whereof, the said Robert Earl of Warwick, and Commissioners, have hereunto set their Hands and Seals, the Fourteenth Day of March, in the Nineteenth Year of the Reign of our Sovereign Lord King Charles, and in the year of our Lord God, 1643.

ROBERT WARWICK,
PHILIP PEMBROKE,
SAY AND SEAL,
P. WHARTON,
ARTHUR HASLERIG,
COR. HOLLAND,

H. VANE,
SAM. VASSALL,
JOHN ROLLE,

W. SPURSTOW.
MILES CORBET,

R. I. Colonial Records, Vol. I, pg. 143.

EXHIBIT C

ACT OF ASSEMBLY

May, 1647

Forasmuch as we have received from our Noble Lords and Honored Governours, and that by virtue of an ordinance of the Parliament of England, a free and absolute Charter of Civill incorporation, &c. Wee do joyntlie agree to incorporate ourselves, and soe to remaine a Body Politicke by the authoritie thereof, and therefore do declare to own ourselves and one another to be Members of the same Body, and to have right to the Freedome and priviledges thereof by subscribing our names to thess words, following: Vidg't.

Wee, whose names are here vnder written, doe engage ourselves to the vttmost of our Estates and Strength, to mainteyne the authority and to enjoy the Libertie granted to vs by our Charter, in the extent of itt according to the Letter, and to mainteyne each other by the same authoritie, in his lawfull right and Libertie.

And now sith our Charter gives vs powre to governe ourselves and such other as come among vs, and by such a forme of Civill Government as by the Voluntarie consent, &c., shall be found most suitable to our Estate and condition,

It is agreed, by this present Assembly thus incorporate, and by this present act declared, that the forms of Government established in Providence Plantations is

Democraticall; that is to say, a Government held by ye free and voluntarie consent of all, or the greater parte of the free Inhabitants.

R. I. Colonial Records, Vol. I, pg. 156.

EXHIBIT D

AN ACT REPEALING AN ACT, ENTITLED "AN ACT FOR THE MORE EFFECTUALLY SECURING TO HIS MAJESTY, THE ALLEGIANCE OF HIS SUBJECTS, IN THIS HIS COLONY AND DOMINION OF RHODE ISLAND AND PROVIDENCE PLANTATIONS;" AND ALTERING THE FORMS OF COMMISSIONS, OF ALL WRITS AND PROCESSES IN THE COURTS, AND OF THE OATHS PRESCRIBED BY LAW

May 4, 1776

Whereas, in all states, existing by compact, protection and allegiance are reciprocal; the latter being only due in consequence of the former.

And whereas, George the Third, King of Great Britain, forgetting his dignity, regardless of the compact most solemnly entered into, ratified and confirmed to the inhabitants of this colony, by his illustrious ancestors; and till of late, fully recognized by him; and entirely departing from the duties and character of a good king, instead of protecting, is endeavoring to destroy the good people of this colony, and of all the United Colonies, by sending fleets and armies to America, to confiscate our property, and spread fire, sword and desolation, throughout our country, in order to compel us to submit to the most debasing and detestably tyranny; whereby, we are obliged, by necessity, and it becomes our highest duty, to use every means, with which God and nature have furnished us, in support of our invaluable rights and privi-

leges; to oppose that power which is exerted only for our destruction.

Be it therefore enacted by this General Assembly, and by the authority thereof, it is enacted, that an act entitled "An act for the more effectual securing to His Majesty the allegiance of his subjects, in this his colony and dominion of Rhode Island and Providence Plantations," be, and the same is hereby, repealed.

And be it further enacted by this General Assembly, and by the authority thereof, it is enacted, that in all commissions for offices, civil and military; and in all writs and processes in law, whether original, judicial or executory, civil or criminal, wherever the name and authority of the said King is made use of, the same shall be omitted; and in the room thereof, the name and authority of the Governor and Company of this colony, shall be substituted, in the following words, to wit: "The Governor and Company of the English Colony of Rhode Island and Providence Plantations."

That all such commissions, writs and processes, shall be otherwise of the same form and tenure as they heretofore were.

That the courts of law be no longer entitled, nor considered, as the King's courts.

And that no instrument in writing, of any nature or kind, whether public or private, shall, in the date thereof, mention the year of the said King's reign.

Provided, nevertheless, that nothing in this act contained, shall render void or vitiate any commission, writ, process or instrument, heretofore made or executed, on account of the name and authority of the said King being therein inserted.

R. I. Colonial Records, Vol. VII, pg. 552.

EXHIBIT E

SIXTY-FIFTH CONGRESS OF THE UNITED STATES OF AMERICA, AT THE SECOND SESSION, BEGUN AND HELD AT THE CITY OF WASHINGTON ON MONDAY, THE THIRD DAY OF DECEMBER, ONE THOUSAND NINE HUNDRED AND SEVENTEEN

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE .

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years

from the date of the submission hereof to the States by the Congress."

(Signed) CHAMP CLARK,
Speaker of the House of Representatives.

(Signed) THOS. R. MARSHALL,
Vice President of the United States and President of the Senate.

I certify that this Joint Resolution originated in the Senate.

(Signed) JAMES M. BAKER, *Secretary.*

EXHIBIT F

DEPARTMENT OF STATE,

WASHINGTON, December 28, 1917.

His Excellency, the Governor of the State of

SIR:—I have the honor to enclose* a certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an Amendment to the Constitution of the United States," with the request that you cause the same to be submitted to the Legislature of your States for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States.

An acknowledgment of the receipt of this communication is requested.

I have the honor to be, Sir,

Your obedient servant,

(Signed) ROBERT LANSING.

*Enclosure, Exhibit E.

EXHIBIT G

CONCURRENT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES

RATIFYING THE PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, RELATING TO PROHIBITION OF THE MANUFACTURE, SALE, TRANSPORTATION, IMPORTATION AND EXPORTATION OF INTOXICATING LIQUORS FOR BEVERAGE PURPOSES

Whereas, At the first session of the sixty-fifth Congress it was resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein) that the following article be proposed as an amendment of the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the said Constitution, viz.:

"ARTICLE

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided

in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Therefore, resolved, That the legislature of the State of does hereby ratify the above recited proposed amendment to the Constitution of the United States.

And be it further resolved, That the Governor be requested to transmit a copy of these resolutions and preamble to the Secretary of State of the United States of America.

EXHIBIT H

FRANK L. POLK, ACTING SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

To all to Whom these Presents shall come, Greeting:

KNOW YE, That the Congress of the United States at the second session, sixty-fifth Congress begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a Resolution in the words and figures following, to wit—

"JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

And, further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

Now therefore, be it known that I, Frank L. Polk,

Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

(SEAL)

(Signed) FRANK L. POLK,
Acting Secretary of State.

EXHIBIT I

CHAPTER 1740 OF THE PUBLIC LAWS OF RHODE ISLAND, 1919

AN ACT TO REGULATE THE SALE OF NON-INTOXICATING BEVERAGES, AND IN AMENDMENT OF SECTION 1 OF CHAPTER 123 OF THE GENERAL LAWS

It is enacted by the General Assembly as follows:

Section 1. "Non-intoxicating beverages" as used in this act, includes and means all distilled or rectified spirits, wines, fermented and malt liquors which contain one per centum and not more than four per centum by weight of alcohol or any liquors in combination therewith which contain one per centum and not more than four per centum by weight of alcohol.

Sec. 2. No person shall manufacture or sell or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possession or under his charge for the purposes of sale and delivery, any non-intoxicating beverages, unless as hereinafter provided.

Sec. 3. The town councils of the several towns, and the boards of commissoners as hereinafter provided, may grant or refuse to grant licenses to such citizens resident within this state, for the manufacture or sale of non-intoxicating beverages within the limits of such town or city, as they may deem proper; Provided, that the number of licenses granted shall not exceed, in the several cities and towns of the state, one for each five hundred inhabitants as determined by the last census taken under the authority of the United States or the State of Rhode Island.

* * *

Before any license shall be issued under the provisions of this act, the person applying therefor shall give bond to the city or town treasurer in the penal sum of one thousand dollars, * * * and he shall also pay for such license to the town or city treasurer the sum hereinafter named, three-fourths thereof for the use of such town or city, and one-fourth thereof to be paid over by the town or city treasurer to the general treasurer for the use of the state.

* * *

Sec. 5. The electors of the several cities and towns who are qualified to vote in the election of all general officers shall at each electon of general officers, cast their ballots for or against the granting of licenses for the sale of non-intoxicating beverages pursuant to this act. If a majority of the ballots so cast at any such election be against the granting of such licenses, no license under the provision of this act shall be granted in such city or town during the twelve calendar months next after such election nor until such city or town shall vote at some subsequent election of general officers to grant such licenses; but if the majority of the ballots cast at any

such election shall be for the granting of such licenses, then licenses under the provisions of this act shall be granted in such city or town during the twelve calendar months next after such election and until such city or town shall vote at some subsequent election of general officers not to grant such licenses.

* * *

Sec. 7. The fees for licenses shall be as follows:

1. For a license to manufacture or sell at wholesale and retail, not to be drunk on the premises, non-intoxicating beverages, not less than seven hundred dollars nor more than fifteen hundred dollars.

2. For a license to sell non-intoxicating beverages at retail only, for all cities and towns having over fifteen thousand inhabitants, not less than four hundred dollars, nor more than one thousand dollars, and for all other towns not less than three hundred dollars nor more than seven hundred and fifty dollars.

* * *

Sec. 52. The treasurer of every town and city shall on the tenth days of January and July in each year make returns to the general treasurer of all moneys coming to his hands belonging to the State, received under the provisions of this act, which return shall embrace the names of the persons from whom received and the amount received from each person.

* * *

Sec. 56. Section 1 of Chapter 123 of the General Laws, entitled "Of the Suppression of Intemperance," is hereby amended so as to read as follows:

"Section 1. No person shall at any time manufacture or sell, or suffer to be manufactured or sold, except for the purpose of exportation, or keep or suffer to be

kept on his premises or possessions, or under his charge, for the purposes of sale within this state, any rum or other strong liquors or any mixed liquors, a part of which is rum or other strong liquors, unless as hereinafter provided. Whenever the words 'intoxicating liquors' shall be used in this chapter, they shall be deemed to include rum or other strong liquors which contain more than four per centum by weight of alcohol, or any mixed liquors a part of which is rum or other strong liquors which contain more than four per centum by weight of alcohol: Provided that it shall not be unlawful to manufacture, buy, sell or deal in any medicinal, pharmaceutical, scientific, sacramental, mechanical, culinary, flavoring or toilet preparations, which may contain such percentage of alcohol as may be necessary to extract or hold the constituents in solution, preserve the preparation or keep it from freezing; Provided, however, that no such preparation shall be manufactured, bought, sold or dealt in for use as an intoxicating beverage."

* * *

Sec. 58. This act shall take effect on the 1st day of July, A. D. 1919.

JAN
JAMES

Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—VS—

A. MITCHELL PALMER, ATTORNEY GENERAL
AND DANIEL C. ROPER, COMMISSIONER
OF INTERNAL REVENUE, Defendants

BRIEF OF COMPLAINANT ON MOTION TO FILE ORIGINAL BILL

STATE OF RHODE ISLAND
HERBERT A. RICE
Attorney General
A. A. CAPOTOSTO
Assistant Atty. Genl.

PROVIDENCE:
1920

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Supreme Court of the United States

OCTOBER TERM, 1919

No. Original

STATE OF RHODE ISLAND, Complainant

—VS—

A. MITCHELL PALMER, ATTORNEY GENERAL
AND DANIEL C. ROPER, COMMISSIONER
OF INTERNAL REVENUE, Defendants

Brief of Complainant on Motion to File Original Bill

The State of Rhode Island has presented a motion to this Court for permission to file an original bill in equity against A. Mitchell Palmer, a citizen of the State of Pennsylvania, and a resident of Washington, in the District of Columbia, the Attorney General of the United States, and Daniel C. Roper, a citizen of the State of South Carolina, and a resident of Washington, in the District of Columbia, the United States Commissioner of Internal Revenue. It is a suit in equity of a civil nature by the State of Rhode Island against citizens of other States of the United States and arises under the Constitution and laws of the United States, and is for the purpose of enjoining the defendants from enforcing within the State of Rhode Island such titles and sections of an Act of Congress, commonly called the Volstead Act, as apply and are designed to give effect to the so-called Eighteenth Amendment.

Allegations of Bill

The complainant alleges that the State of Rhode Island in the exercise of its inherent and exclusive right to manage and control its internal affairs as a separate community and independent State, and to pursue such legislative policy as will provide adequate revenue by developing the resources and encouraging the industries within its territorial limits, has permitted and caused to be legally established within the State extensive and numerous manufacturies for the production of intoxicating liquors for beverage purposes, and that many thousands of dollars are invested therein and in the business of retailing the products thereof, and said manufacturies and business have greatly added to the value of the ratable property within the State; that there are within the State at the present time large quantities of intoxicating liquors that were manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, and said liquors are of great value as ratable property, incapable of estimation, and hitherto have been and now are a considerable source of revenue to complainant; and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhode Island, the extensive business of manufacturing and selling intoxicating liquors for beverage purposes within the State of Rhode Island will be entirely destroyed and the value of the property especially adapted for use in said business will be greatly depreciated, and the intoxicating liquors now within the State, manufactured for beverage purposes both prior and subsequent to the alleged ratification of the so-called Eighteenth Amendment, will become of no value, whereby the revenue to the State from all said property, based upon the valuation thereof, will be seriously impaired, to the great and irreparable injury of complainant.

The complainant also alleges that the State of Rhode Island, through its municipal subdivisions, grants licenses for the manufacture and sale of non-intoxicating liquors for beverage purposes, said non-intoxicating liquors including "all distilled or rectified spirits, wines, fermented and malt liquors, which contain one per centum and not more than four per centum by weight of alcohol," said non-intoxicating liquors being intoxicating liquors within the intent and meaning of said Volstead Act; and that the State of Rhode Island and its municipal subdivisions have for many years derived and now derive extensive revenue from the fees for said licenses, said revenue amounting to more than six hundred thousand dollars per year; that complainant has received and now receives one-fourth of all the revenue from all licenses issued in the State of Rhode Island for the manufacture and sale of intoxicating or non-intoxicating liquors for beverage purposes, as aforesaid, and that should the aforesaid provisions of the Volstead Act be enforced within the State of Rhode Island all said revenues to the State of Rhode Island and to its municipal subdivisions will be entirely lost, to the great and irreparable injury of complainant.

The bill then further alleges that the so-called Volstead Act provides that the Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants are authorized and directed to enforce such portion of said Act as relates and applies to the enforcement of the so-called Eighteenth Amendment, from and after the date when said so-called Eighteenth Amendment is alleged to go into effect, to wit, on or about the 16th day of January, 1920; and although the so-called Eighteenth Amendment is unconstitutional and void, and although such portion of the so-called Volstead

Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, it is nevertheless the purpose, intent and threat of said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants, to enforce the fines, imprisonments and forfeitures provided in said Volstead Act, as aforesaid, against the people of the State of Rhode Island, on the ground that the manufacture, sale, barter, transport, delivery, furnishing or possession of intoxicating liquor within the State of Rhode Island is contrary to law and a crime against the United States, although all said acts within the State of Rhode Island are lawful and authorized under the constitution and laws of said State; and further, that the enforcement of the so-called Eighteenth Amendment and of the provisions of the so-called Volstead Act, as aforesaid, as proposed, intended and threatened by the said Commissioner of Internal Revenue and the Attorney General of the United States, their assistants, subordinates, agents and servants, will deprive the people of the State of Rhode Island of that liberty of self-government in the management and control of their domestic affairs as a community, which it was the very purpose of the Constitution of the United States to secure to them, and will also deprive them in their sovereign capacity of that power of police and economy in the regulation of the civil institutions of said State, adapted for the internal government thereof, which the people of said State have possessed, exercised and enjoyed for nearly three centuries, a power never delegated to the United States, but expressly reserved to the people of Rhode Island by the Constitution of the United States; all of which is to the irreparable injury and damage of the people of the State of Rhode Island, and of this complainant.

The suit rests upon the charge that the so-called Eighteenth Amendment is usurpatory, unconstitutional and void, that such portions of the so-called Volstead Act as are designed to give effect to the Eighteenth Amendment are unconstitutional and void, and that the defendants are intending and threatening to act without any authority in law. The prayer, therefore, seeks to enjoin and restrain the defendants from so acting, to the irreparable injury of complainant. The merits of the bill must be determined upon its theory after argument thereon. The motion to file only concerns the prima facie statement of a case.

Motion to File

In *State of Washington* v. *Northern Securities Co.*, 185 U. S. 254, (1902), upon an application by the State of Washington for leave to file an original bill, the Court observed that the usual practice in an equity case had been to hear the application ex parte, and that ordinarily the motion for leave to file would be granted as a matter of course. In further explaining the practice, the Court said:

> "In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana* v. *Texas;* that is, without intimating any opinion whatever on the question suggested, to grant leave to file in accordance with the usual practice."

In response to the order to show cause why the bill should not be filed the defendants urge three grounds upon which the motion to file should be denied:

First. That the State of Rhode Island is not a party in interest.

Second. That the suit is against the United States.

Third. That the issue is political.

THE STATE OF RHODE ISLAND IS A PARTY IN INTEREST.

The bill alleges that the defendants, their assistants, subordinates, agents and servants, are about to enter the State and to assert an authority therein that is inconsistent with the power of the State to regulate its internal affairs. The defendants threaten acts that are in defiance of existing State power and existing State law. In so far as they are able to carry out their threats they will in effect interfere with the functions of the State by illegal and unwarranted acts. Under these circumstances it is the right and duty of the State to assert its authority and seek to maintain it in this Court. Where, as in this case, the wrongs are threatened by officials of the Federal Government who are beyond the territorial boundaries of the State this tribunal is not merely the proper, but the only tribunal in which the authority of the State may be vindicated.

In re Debs, 158 U. S. 564, (1895) on a petition for a writ of habeas corpus brought by the defendant Debs to relieve him from imprisonment for contempt, after having disobeyed an injunction forbidding interference with trains carrying the mails, the defendant contended that the United States had no standing in a court of equity and that therefore the injunction was invalid. Mr. Justice Brewer, in delivering the opinion of the Court, said:

> "Neither can it be doubted that the government has such an interest in the subject matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property

and the government has no property interest. A sufficient reply is that the United States have a property in the mails. * * *"

"We do not care to place our decision upon this ground alone. Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interests of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

U. S. v. *San Jacinto Tin Co.*, 125 U. S. 273.

U. S. v. *American Bell-Tel. Co.*, 128 U. S. 315.

That it is as important for a State Government to seek assistance from the Court in the exercise of its powers and the discharge of its duties as it is for the Federal Government, was clearly indicated by Mr. Justice Day in *Hammer* v. *Dagenhart*, 247 U. S. 251, 275, (1917):

"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government."

The State, however, has a further interest in this suit. It not only seeks to prevent an interruption in the exercise of its governmental powers, but also seeks the protection which this Court may afford by injunctive relief from irreparable damage to its property interests. The State and its subdivisions have already lost considerable sums by the refusal of its citizens to take out licenses for the sale of non-intoxicating liquors, said non-intoxicating liquors under the laws of the State of Rhode Island being intoxicating liquors under the so-called Volstead Act. The refusal to take out said licenses is due to fear of fines and penalties under the provisions of the so-called Volstead Act and in consequence of the threats of the defendants to enforce said Act although unconstitutional and void. The State and its subdivisions will continue to lose large sums aggregating more than six hundred thousand dollars per year. The State will also suffer serious losses in its income from taxes on ratable property, which it has by its laws permitted to be created and to exist within the State under its protection. This property damage, however, the defendants contend is remote and indirect. They even assert that there is no deprivation of property or property rights because the State is not deprived of a fund now existing or to which its right has already accrued. This position they do not sustain by the citation of a single authority and such a limited view of the scope of equitable jurisdiction and relief is entirely at variance with the recent decisions of this Court.

In the case of *Hammer* v. *Dagenhart* (supra), a bill was filed in the United States District Court for the western district of North Carolina by a father in his own behalf, as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employes in a cotton mill at Charlotte, North

Carolina, to enjoin the enforcement of an Act of Congress, intended to prevent interstate commerce in the production of child labor. The suit was directed against the United States Attorney. The District Court held the act unconstitutional, and entered a decree enjoining its enforcement. The cause came to this Court on appeal and the decree of the District Court was here affirmed. The only property interest protected by equity was the right of continuing in an employment undisturbed by enforcement of an unconstitutional act.

The case of *Traux* v. *Raich,* 239 U. S. 33, (1915) is of a similar nature. The State of Arizona passed a law providing that no employer of more than five workers shall employ not less than eighty per cent of qualified electors or native-born citizens. The appellee was a native of Austria and an inhabitant of Arizona, but not a qualified elector. He was employed as a cook by the appellant, Traux. Traux had nine employes, of whom seven were neither native-born citizens of the United States or qualified electors. The appellee was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon the appellee filed his bill in the District Court of the United States for the District of Arizona to enjoin the Attorney General of the State of Arizona from enforcing the act. The bill sought a decree declaring the act to be unconstitutional and restraining procedure thereunder. The District Court enjoined the defendants from enforcing the act and on appeal to this Court the decree of the District Court was affirmed. In reference to the claim of the appellants that the bill did not state facts sufficient to constitute a cause of action in equity, Mr. Justice Hughes, delivering the opinion of the Court, said:

"The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one of the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." . . .

"It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

In discussing the basis of equitable jurisdiction in the

recent case of *International News Service* v. *Associated Press,* 248 U. S. 236, (1918) the Supreme Court said:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of pecuniary nature as a property right * * * and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

Hammer v. *Dagenhart,* 247 U. S. 251 (1918).

Wilson v. *New,* 243 U. S. 332 (1917).

Truax v. *Raich,* 239 U. S. 33 (1915).

Dobbins v. *Los Angeles,* 195 U. S. 223 (1904).

The State of Rhode Island is a party in interest in this suit not only for the protection of its governmental and property rights in its corporate capacity, but it also has an interest and a duty to all its citizens to secure to them their common rights whenever the action complained of affects the public at large. This suit therefore is brought not only on behalf of the State, but also on behalf of the people of the State. This interest in the people of the State rests upon the obligation to protect all the citizens of the State in the unrestricted exercise and free enjoyment of all those rights and privileges to which they are entitled. The State in thus acting as trustee, guardian or representative of all the people has an interest in the matter at issue, even if it had itself no pecuniary or property rights of its own involved.

In *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230 (1907) an original bill in equity was brought by the State of Georgia to enjoin a foreign corporation from discharging noxious gases from its works in Tennessee over large tracts

of territory in Georgia. The bill alleged that the noxious gases worked a wholesale destruction of forests, orchards and crops, and that other injuries resulted and were threatened. The jurisdiction was sustained and an injunction granted by this Court. Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity as quasi sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests, and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner, is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads. . . .
>
> "Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law."

The view that it is the duty of the Nation or State to enforce the common rights of its citizens is expressed in the

case of *In re Debs,* 158 U. S. 564 (1895). Mr. Justice Brewer there remarked:

> "It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individuals or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large and are in respect of matters which by the Constitution are intrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or to prevent it from taking measures therein to fully discharge those constitutional duties."

A State holds in trust the public interests of its citizens, and where it seeks to fulfil its obligation under that trust by injunctive process, a pecuniary interest of the State in the relief sought is not essential. It is enough if there be an interest or concern arising out of the obligation to those for whose benefit the suit is brought. Mr. Justice Van Devanter in *United States* v. *New Orleans Pacific Railway Co.,* (Jan. 1919).

In support of the contention that the State of Rhode Island has no interest in the present controversy, the defendants cite the cases of *New Hampshire* v. *Louisiana,* 108 U. S. 76, (1882); *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, (1887); and *Louisiana* v. *Texas,* 176 U. S. 1, (1889). These cases are not in point. They are all discussed and distinguished in *Missouri* v. *Illinois,* 180 U. S. 208, (1900). In *New Hampshire* v. *Louisiana,* the complainant State was endeavoring to enforce the contract claims of some of its citizens who were the owners of bonds of the defendant State. In *Wisconsin* v. *Pelican Insurance Co.,* the complain-

ant State was endeavoring to enforce its penal laws against the citizens of another State. In *Louisiana* v. *Texas*, the action complained of was not the action of the State of Texas, but the unauthorized conduct of its health officer.

THE SUIT IS NOT AGAINST THE UNITED STATES.

The principle has been firmly established by this Court that individuals, who, as officers, are clothed with some duty with regard to the enforcement of the laws and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act violating the Federal Constitution, may be enjoined by a Federal court of equity upon such action. An injunction to prevent a Federal officer from doing that which he has no legal right to do is not an interference with the discretion of the officer, nor with the government of the United States. The United States has no interest in the enforcement of laws that are unconstitutional and void.

In *United States* v. *Lee*, 106 U. S. 196, (1882) an objection was made to the Court's jurisdiction, on the ground that the United States was the real party where ejectment had been brought against two Federal officers. In overruling the objection, Mr. Justice Miller said:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence (i. e. that there was no jurisdiction because it was really a suit against the United States) cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of judicial tribunals, for rights which have been invaded by the officers of the government, professing to

act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?"

The same principle was followed in the case of *Ex parte Young*, 209 U. S. 123, (1908), where the Court, through Mr. Justice Peckham, remarked:

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of

his official or representative character and is subjected in his person to the consequences of his individual conduct."

In *Philadelphia Co.* v. *Stimpson*, 223 U. S. 605, (1911) a suit was brought in the Supreme Court for the District of Columbia, to restrain the Secretary of War from causing criminal proceedings to be instituted against the complainant because of the reclamation of its land outside certain prescribed limits. This Court entertained jurisdiction of the bill against objection that the proceeding was virtually a suit against the United States. Mr. Justice Hughes, in delivering the opinion of the Court, said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Citations) And in case of an injury threatened by his illegal actions, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Citations) And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. (Citations). . . .
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In *Truax* v. *Raich*, 239 U. S. 33, (1915) the Attorney General of the State of Arizona was enjoined from enforcing the Arizona anti-alien labor law. In delivering the opinion

of the Court, Mr. Justice Holmes said, in reference to the point under discussion:

> "As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, which has repeatedly been followed."

Ludwig v. *Western U. Teleg. Co.*, 216 U. S. 146.

Western U. Teleg. Co. v. *Andrews*, 216 U. S. 165.

Hendron v. *Chicago, R. I. & P. R. Co.*, 218 U. S. 135

Hopkins v. *Clemson Agri. College*, 221 U. S. 636.

Philadelphia Co. v. *Stimson*, 223 U. S. 607, 620.

Home Teleph. & Teleg. Co. v. *Los Angeles*, 227 U. S. 278.

Among the more recent cases to the same effect may be mentioned *Wilson* v. *New*, 243 U. S. 332, (1917); *Hammer* v. *Dagenhart*, 247 U. S. 251, (1918); and *Waite* v. *Macy*, 246 U. S. 606, (1918). In the first of these, the suit was against the United States Attorney for the Western District of Missouri; in the second, against the United States Attorney for the Western District of North Carolina; and in the third, against an Administrative Board designated by the Secretary of the Treasury.

In their response to the order to show cause why the present bill should not be permitted to be filed, the defendants have urged that the present suit is against the United States, and in support of that contention cite the cases of *Minnesota* v. *Hitchcock*, 185 U. S. 373, (1902) and *Oregon*

v. *Hitchcock*, 202 U. S. 68, (1906). Both of those cases were against the Secretary of the Interior to enjoin him from disposing of lands within Indian reservations, and it is evident that no effective decree could be entered unless the United States were a party. These cases are not in point. The present suit seeks injunctive relief solely against the defendants named. The United States is not a necessary party and has no interest in the proceedings.

The Issue Is Not Political.

Whether a complainant is a State is a political question. *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1, (1831). What government is the established one in a State is a political question. *Luther* v. *Borden*, 7 How. 1, (1849). In *Georgia* v. *Stanton*, 6 *Wall.* 50, (1868), Mr Justice Nelson, in delivering the opinion of the Court, said: "The case bearing most directly on the one before us is *The Cherokee Nation* v. *The State of Georgia*." The Court was there called upon to enjoin the enforcement of the Reconstruction Acts which were designed to determine as a political question the legitimate government of Georgia. The case of *The State of Mississippi* v. *Johnson*, 4 Wall. 475, (1867), also sought to enjoin the enforcement of the Reconstruction Acts. These acts recited that no legal State government existed in Mississippi, and that it was the purpose of Congress to establish a republican state government.

In *Pacific States Telephone and Telegraph Company* v. *The State of Oregon*, 223 U. S. 118, (1912), Mr. Chief Justice White, in delivering the opinion of the Court, said:

> "It is the government, the political entity, which is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the

rights of an individual because the repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form."

Whether the government of Oregon was still republican was a political question. *Luther* v. *Borden*, 7 How. 1, (1849).

The above cases are the only ones cited by the defendants in support of the contention that the issue here is political. They all relate to the constitutional guarantee to every State of a republican form of government. (Art. IV. Sec. IV.) They are not in point. It is well settled that it rests with Congress to decide what government is the established one in a State, and to enforce the guarantee of a republican government. These questions are not here involved. The complainant is here seeking to test judicially the exercise of power assailed, on the ground that its exertion will injuriously affect the rights of complainant "because of repugnancy to constitutional limitation." The exercise of political power by Congress is by virtue of constitutional authority. Usurpation of power has no warrant. "This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

The State of Rhode Island respectfully urges that its motion for permission to file its bill be granted.

HERBERT A. RICE
Attorney General.

A. A. CAPOTOSTO
Assistant Att'y. Gen'l.

No. 29, Original.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND, COMPLAINANT,

v.

A. MITCHELL PALMER, ATTORNEY GENERAL, and DANIEL C. ROPER, Commissioner of Internal Revenue, Defendants.

NOTICE OF MOTION.

Please take notice that at the opening of the session of the Supreme Court of the United States on Monday, March 1, 1920, or as soon thereafter as counsel can be heard, the undersigned will submit the annexed motion for leave to file brief on behalf of the States of Delaware, North Carolina, Kentucky, Louisiana, Indiana, Alabama, Maine, Arkansas, Michigan, Florida, Oregon, Kansas, West Virginia, Nevada, Nebraska, Montana, North Dakota, South Dakota, Wyoming, Utah and Arizona as *amici curiae*, in support of motion to dismiss Bill of Complaint.

CHARLES E. HUGHES.

DATED
NEW YORK, FEBRUARY 26, 1920.

To:

HONORABLE HERBERT A. RICE,
Attorney General of the State of Rhode Island.

HONORABLE ALEXANDER C. KING,
Solicitor-General.

No. 29, Original.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND, COMPLAINANT,

v.

A. MITCHELL PALMER, ATTORNEY GENERAL, and Daniel C. Roper, Commissioner of Internal Revenue, defendants.

Motion for leave to file brief on behalf of the States of Delaware, North Carolina, Kentucky, Louisiana, Indiana, Alabama, Maine, Arkansas, Michigan, Florida, Oregon, Kansas, West Virginia, Nevada, Nebraska, Montana, North Dakota, South Dakota, Wyoming, Utah and Arizona, as *amici curiae*, in support of motion to dismiss Bill of Complaint.

Now comes Charles E. Hughes, attorney and counsellor of this Court, and states that there is involved in this suit the question whether the Eighteenth Amendment to the Constitution of the United States is a valid

amendment. That by reason of their interest in this question the States of Delaware, North Carolina, Kentucky, Louisiana, Indiana, Alabama, Maine, Arkansas, Michigan, Florida, Oregon, Kansas, West Virginia, Nevada, Nebraska, Montana, North Dakota, South Dakota, Wyoming, Utah and Arizona, [redacted] have instructed the undersigned to submit a brief in their behalf in support of the motion to dismiss the Bill of Complaint brought by the State of Rhode Island.

Therefore leave is prayed to file a brief on behalf of the States mentioned, as *amici curiae*, in support of the motion to dismiss.

Respectfully submitted,

CHARLES E. HUGHES.

DATED
NEW YORK, FEBRUARY 26, 1920.

We consent that permission be granted for the filing of brief as above prayed for.

Attorney General of the State of Rhode Island.

Solicitor General.

FILED
MAR 1 1920
JAMES D. MAHER,
CLERK.

No. 29, Original

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND,
Complainant,

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No. 29, Original.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND,
Complainant,

vs.

A. MITCHELL PALMER, Attorney General, and DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

Brief on behalf of the States of Delaware, North Carolina, Kentucky, Louisiana, Indiana, Alabama, Maine, Arkansas, Michigan, Florida, Oregon, Kansas, West Virginia, Nevada, Nebraska, Montana, North Dakota, South Dakota, Wyoming, Utah and Arizona, as amici curiae, in support of motion to dismiss bill of complaint.

This brief is filed in support of the motion to dismiss the bill of complaint upon the ground that it does not present justiciable questions and is without equity.

The bill of complaint is directed to the alleged invalidity of the Eighteenth Amendment of the Federal Constitution. So far as the bill assails the Act of Congress, commonly called the Volstead Act, the attack is based solely upon the ground that the Act is designed to give effect to that Amendment. The complainant alleges that the Eighteenth Amendment is "unconstitutional, inoperative and void." But the bill of complaint contains no allegation that the Amendment was not duly adopted if it be found to be of a nature which permitted its adoption.

On the contrary, it appears from the bill of complaint:

(1) That the Congress enacted a Joint Resolution proposing the Amendment. It appears from the Joint Resolution itself, a copy of which is annexed to the bill, and it is not denied, that two-thirds of each House of the Congress concurred in the Joint Resolution (Bill, Par. V; Ex. E);

(2) That the Secretary of State forwarded a certified copy of the Joint Resolution to the Governor of each State (*id.*, Par. VII; Ex. F);

(3) That the Governors of the several States submitted the Amendment as set forth in the Joint Resolution to their respective Legislatures (*id.* Par. VII);

(4) That thereafter the Legislatures of three-fourths of the several States enacted Resolutions of ratification of the Amendment and that certified copies of these Resolutions (the certification setting forth the ratification of the Amendment) were forwarded to the Secretary of State of the United States (*id.*, Par. VII);

(5) That the Secretary of State of the United States made promulgation that the Eighteenth Amendment had been ratified by Legislatures of three-fourths of the States and had become valid to all intents and purposes as a part of the Constitution of the United States (*id.*, Par. XI; Ex. H).

The proceedings thus set forth in the bill of complaint are challenged as invalid only upon the ground that the Amendment was not one that could be adopted by conformity to constitutional procedure. The charge is that the submission of the Amendment was an "unconstitutional and revolutionary" proposal, destructive of the fundamental principles of the government and in derogation of the sovereign power of the State of Rhode Island with respect to matters of police and its control over its internal affairs.

It is at once apparent that any question of the wisdom of the Amendment, of its political expediency, is not open to examination in this Court. This Court deals with questions of law, not with questions of political policy. This principle is constantly emphasized in the determination by this Court of the validity and construction of Acts of Congress; and the recognition of the limitations which inhere in that exercise of the judicial function make it obvious that the same limitations exist when a decree is sought striking down an amendment to the Constitution itself. While this is a preliminary observation, it goes to the root of the case. The bill of complaint of the State of Rhode Island raises nothing but a question of policy—a question which is not justiciable and hence has no place in this Court.

We present the following points:

First: The State of Rhode Island does not bring its bill of complaint to enforce any property right or any interest of the State which can be regarded as the proper subject of judicial consideration. It is well-settled that a State cannot bring a bill of complaint in this Court solely for the protection of alleged rights of sovereignty or political jurisdiction.

Second: The framers of the Constitution refused to adopt such a restriction upon the amending power as that for which the complainant contends, and no such restriction can be implied. In urging this restriction the complainant virtually seeks to have the Constitution amended by judicial decree. The question whether the Eighteenth Amendment should be adopted was essentially a political question.

(a) The ground upon which this Court holds the action of officers or of legislatures to be unconstitutional is that it is the duty of the Court to enforce the fundamental *law* which is found in the Constitution itself. It follows that in the absence of constitutional restriction, having the force of *a rule of law*, the Court has no authority to invalidate action as unconstitutional.

(b) In view of the express exceptions to the power of amendment contained in Article V of the Constitution, other exceptions cannot be implied. *Expressio unius est exclusio alterius.*

(c) The proceedings of the Constitutional Convention of 1787 demonstrate that it was not the intention of the framers of the Constitution to re-

strict the amending power except as expressly stated. The Convention expressly refused to extend the exceptions in Article V so as to prevent amendments affecting the States in their "internal police."

(d) The complainant, in seeking to have the Court establish restrictions upon the amending power, in effect asks for an amendment of the Constitution by judicial action. Such restrictions upon the amending power could not be removed by any process of constitutional amendment, as prescribed, and the establishment of such restrictions by decree of the Court would be contrary to the fundamental principles of our government.

Third: If this Court may consider the question whether an amendment not expressly prohibited by the Constitution itself can validly be adopted, it is submitted that there is nothing in the nature of the Eighteenth Amendment which exposes it to the charge of invalidity.

(a) The adoption of the first ten amendments did not restrict the amending power conferred by Article V.

(b) Constitutional amendments may restrict the States in the exercise of their police power or control over internal concerns. This is the necessary effect of the operation of the Fourteenth Amendment.

(c) Constitutional amendments are not limited to matters which concern the framework of government. They may operate directly upon the status and rights of persons. This is manifest from the operation of the Thirteenth Amendment.

ARGUMENT.

FIRST: The State of Rhode Island does not bring its bill of complaint to enforce any property right or any interest of the State which can be regarded as the proper subject of judicial consideration.

The complainant asserts its "inherent and exclusive right to manage and control its internal affairs as a separate community and independent State." It alleges that it is entitled "to pursue such legislative policy as will provide adequate revenue by developing the resources and encouraging the industries within its territorial limits." It asserts that it has permitted and caused to be legally established numerous manufactories for the production of intoxicating liquors for beverage purposes and that these have added greatly to the value of the "ratable property" within the State; that there are within the State large quantities of intoxicating liquors which are of great value as "ratable property" and which are a considerable source of revenue to the complainant; and that should the provisions of the Volstead Act, based upon the authority of the Eighteenth Amendment, be enforced, this business would be largely destroyed and the property invested therein would be depreciated, whereby the source of revenue to the State would be seriously impaired (Bill of Complaint, Par. XIII). Again, it is said that the enforcement of the Eighteenth Amendment, and of the Volstead Act based upon its authority, will deprive the people of the State of Rhode Island "of that liberty of self-government" which it was the puprose of the Constitution of the United States to secure to them, and also deprive them "in their sovereign capacity of that power of police and

economy in the regulation of the civil institutions of said State" which was reserved to them by the Constitution of the United States.

In short, the bill of complaint invokes the jurisdiction of the Court for the protection of the sovereignty of the State of Rhode Island as distinguished from any property right or interest which may be the subject of judicial cognizance. The allegations in the bill with respect to the revenues of the State and the depreciation of what is called "ratable property" has obvious reference to the exercise of the taxing power.

It is well settled, however, that the original jurisdiction of this Court to entertain a controversy between a State and citizens of another State does not extend to complaints by a State presented solely for the purpose of protecting its sovereignty and political jurisdiction. This was decided in the cases relating to the Reconstruction Acts of 1867.

In *Georgia* v. *Stanton*, 6 Wall. 50, the bill was filed in this Court against the Secretary of War to restrain the execution of the Reconstruction Acts as unconstitutional. It is well-settled that administrative officers, including the Secretary of War, may be enjoined in a proper case when, under cover of unconstitutional acts or by an abuse of power, property rights are invaded (*Philadelphia Co.* v. *Stimson*, 223 U. S., 605). But the gravamen of the bill brought by the State of Georgia was that the execution of the Acts of Congress would destroy the sovereignty of the State by annulling and totally abolishing the existing State Government. The Court held that the bill called for a judgment upon a political question

and therefore could not be entertained by the Court. The Court said:

> "In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained.
>
> "This is the substance of the complaint, and of the relief prayed for. . . .
>
> "That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."

The Court added that the bill of complaint in setting forth the political rights of the State averred that Georgia owned "certain real estate and buildings therein, State capitol, and executive mansion, and other real

and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property." But it was said to be apparent that this reference to property was only by way of showing one of the grievances resulting from the threatened destruction of the State, and not as a specific ground of relief.

See also *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 296.

Suits in which the State attempts to vindicate its sovereignty or political jurisdiction, as such, are to be distinguished from those in which, while asserting an interest in "the earth and air within its domain" in a *quasi-sovereign* capacity, the State is seeking to protect the public health and to prevent injuries to persons and property, as, for example, by securing the abatement of nuisances.

> *Missouri* v. *Illinois*, 180 U. S. 208;
> *Kansas* v. *Colorado*, 185 U. S. 125, 141;
> *Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 237.

The jurisdiction established in this class of cases in no way affects the authority of the decision in *Georgia* v. *Stanton*, *supra*.

If a bill of complaint charging that unconstitutional legislation of Congress, alleged to threaten the destruction of the sovereignty of the State, did not present a justiciable controversy, but only a political question, it is obvious that an attack upon a Constitutional amendment solely upon the ground that it impairs State sovereignty cannot be regarded as presenting other than a political question.

SECOND: The framers of the Constitution refused to adopt such a restriction upon the amending power as that for which the complainant contends, and no such restriction can be implied. In urging this restriction the complainant virtually seeks to have the Constitution amended by judicial decree. The question whether the Eighteenth Amendment should be adopted was essentially a political question.

(a) The familiar ground upon which the Court holds legislation or official action to be invalid, as unconstitutional, is that the Court is enforcing the fundamental *rule of law* which the Constitution itself establishes.

The classic statement of the principle is found in the opinion of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 177, 178. The Chief Justice said:

> "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> "If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. * * *
>
> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its

invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

It goes without saying that in the absence of a rule of law, which it is the province and duty of the Judicial Department to apply, there is no authority for the Court to hold official action or legislation to be unconstitutional. It is not even sufficient that the Constitution itself prescribes a duty, if the duty be of a political character and be committed exclusively to another Department of the Government. Thus, the enforcement of the provision of Section 4 of Article IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government," is of a polit-

ical character and is confided solely to Congress; there is no authority in the judiciary to substitute its judgment in the matter.

Luther v. *Borden*, 7 How. 1.
Pacific Telephone Company v. *Oregon*, 223 U. S. 118.

It necessarily follows that in no possible aspect is there any ground for the bill of complaint brought by the State of Rhode Island, challenging the Eighteenth Amendment by reason of its nature, unless there can be found in the Constitution itself a restriction upon the amending power which renders the Amendment invalid.

(b) Article V, apart from procedural provisions, contains two limitations of the power to amend, as follows:

> "Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

In the light of these exceptions, no others may be implied. The familiar principle of construction—*expressio unius est exclusio alterius*—should control. When the framers of the Constitution deliberately made two exceptions, and none others, by what warrant can other exceptions be created through judicial action?

(c) The proceedings of the Constitutional Convention of 1787 show conclusively that it was not the intention to

create the restriction with respect to the power of amendment for which the State of Rhode Island now contends. *The Constitutional Convention expressly refused to adopt such a restriction.*

The framers of the Constitution did not expect perfection. On the contrary, they contemplated the necessity and probability of amendments and it was clearly their intention not to fetter the amending power except as the proviso in Article V expressly stated.

Among the resolutions proposed by Mr. Randolph under date of May 29, 1787, (in the Constitutional Convention) appears the following:

> "13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."
>
> I Farrand's Records of the Federal Convention, 22; 5 Elliot's Debates, 128.

In the Pinckney plan submitted on the same day there appears the following article:

> "16. If Two Thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a Convention for the purpose of amending the Constitution—Or should Congress with the Consent of Two Thirds of each House propose to the States amendments to the same—the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution."
>
> III Farrand, 601; 5 Ell. Deb. 132.

It will be observed that neither of these proposals contemplated any restriction upon the power of amendment so far as the nature of amendments was concerned.

In the Committee of the Whole House, when proposition 13 of the Randolph plan came up, Mr. Pinckney said that he "doubted the propriety or necessity of it." Mr. Gerry favored it, saying:—"The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt. Nothing had yet happened in the States where this provision existed to prove its impropriety."

The proposition was then postponed for further consideration.

I Farrand, 121-122.

The Randolph resolution came up again in the Committee of the Whole House on June 11th, when the following proceedings were had:

> "(Resolution 13.) for amending the national Constitution hereafter without consent of Natl. Legislature (being) considered, several members did not see the necessity of the (Resolution) at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary.
>
> "Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in any easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legisla-

ture, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.

"Mr. Randolph [enforced] these arguments. The words, 'without requiring the consent of the Natl. Legislature' were postponed. The other provision in the clause passed nem. con."

I Farrand, 202, 203.

The Randolph resolution was adopted June 13th, in the Committee of the Whole House, with the omission of the words "and that the assent of the National Legislature ought not to be required thereto." And the resolution in this form, as reported by the Committee of the Whole House, was adopted by the Convention on July 23rd.

I Farrand, 231; II *id.* 84.

In the Wilson Papers, with respect to the action of the Committee of Detail, the following appears:

"This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose."

II Farrand, 159, 174.

And the Committee of Detail reported:

"XIX. On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature

of the United States shall call a Convention for that purpose."

II Farrand, 188.

When this report was taken up in the Convention the following occurred:

"Art: XIX taken up.

"Mr. Govr. Morris suggested that the Legislature should be left at liberty to call a Convention, whenever they please.

"The art: was agreed to nem: con:"

II Farrand, 467, 468.

It was not until the last days of the Convention that the restrictive proviso which now appears in Article V of the Constitution was inserted, and apparently the questions previously considered had been only as to the mode in which amendments should be adopted and not with respect to a limitation of the scope of the amending power.

On September 10th, in the Convention, Mr. Gerry moved to reconsider Article XIX (relating to Amendments). He expressed the fear that two-thirds of the States might obtain a Convention, a majority of which could bind the Union "to innovations that may subvert the State Constitutions altogether." Mr. Hamilton differed with Mr. Gerry. He said that he did not object to the consequences stated and that "there was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State." He thought that as many had wished that there had been an easy

method of amending the Articles of Confederation it "was equally desirable that an easy mode should be established for supplying defects which will probably appear in the new System."

II Farrand, 558.

After a discussion it was decided to require ratification by three-fourths of the States, instead of two-thirds, and the provision was then put in the following form on motion of Mr. Madison, seconded by Mr. Hamilton:

> "'The Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S.:'"

II Farrand, 559.

Mr. Rutledge then raised the objection to giving a power by which the Articles relating to slaves might be altered by States "not interested in that property and prejudiced against it", and to obviate this objection a provision was added that no amendments should be made prior to the year 1808 affecting the provisions in question.

This was the only limitation on the amending power which up to that time was favorably considered.

The record of the proceedings of September 10th is as follows:

"Mr. Gerry moved to reconsider Art. XIX, * * *

"This Constitution he said is to be paramount to the State Constitutions. It follows, hence, from this article that two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether. He asked whether this was a situation proper to be run into——

"Mr. Hamilton 2ded. the motion, but he said with a different view from Mr. Gerry—He did not object to the consequences stated by Mr. Gerry—There was no greater evil in subjecting the people of the U. S. to the major voice than the people of a particular State—It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislatures will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case.

"Mr. Madison remarked on the vagueness of the terms, 'call a Convention for the purpose' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?

"On the motion of Mr. Gerry to reconsider

"N. H. div. Mas. ay-Ct. ay. N. J.—no. Pa. ay. Del. ay. Md. ay. Va. ay. N—c ay. S. C. ay. Geo. ay. (Ayes—9; noes—1; divided—1.)

"Mr. Sherman moved to add to the article 'or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States' "

"Mr. Gerry 2ded. the motion

"Mr. Wilson moved to insert 'two thirds of' before the words 'several States'—on which amendment to the motion of Mr. Sherman

"N. H. ay. Mas. (no) Ct. no. N. J. (no) Pa. ay —Del.—ay. Md. ay. Va. ay. N. C. no. S. C. no. Geo. no. (Ayes—5; noes—6.)

"Mr. Wilson then moved to insert 'three fourths of' before 'the several Sts' which was agreed to nem: con:

"Mr. Madison moved to postpone the consideration of the amended proposition in order to take up the following,

" 'The Legislature of the U—S—whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S.'

"Mr. Hamilton 2ded. the motion.

"Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves

might be altered by the States not interested in that property and prejudiced against it. In order to obviate this objection, these words were added to the proposition: 'provided that no amendments which may be made prior to the year 1808, shall in any manner affect the 4 & 5 sections of the VII article'—The postponement being agreed to,

"On the question On the proposition of Mr. Madison & Mr. Hamilton as amended

"N.H. divd. Mas.ay. Ct. ay. N.J. ay. Pa. ay. Del. no. Md. ay. Va ay. N.C.ay S.C.ay. Geo.ay. (Ayes—9; noes—1; divided—1.)"

II Farrand, 557-559.

The Article relating to amendments as it came from the Committee of Style was as follows:

"V

"The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as parts thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808, shall in any manner affect the and sections of article the ."

II Farrand, 602.

On September 15th, the Article in this form (now Article V) was discussed in the Convention. Then, Mr.

Sherman made an explicit proposal that there should be a limitation on the scope of the amending power, in order to protect the States. He said that he "thought it reasonable that the proviso in favor of the States importing slaves should be extended to provide *that no State should be affected in its internal police, or deprived of its equality in the Senate*".

Accordingly, Mr. Sherman moved "to annex to the end of the Article a further proviso—'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate' ". Mr. Madison objected to this, saying that if the Convention began on these special provisos every State would insist on them "for their boundaries, exports, &c." And Mr. Sherman's motion was lost. Mr. Sherman then moved to strike out Article V altogether, but this motion was lost. Thereupon, Mr. Morris moved to annex the proviso "that no State, without its consent shall be deprived of its equal suffrage in the Senate" and this motion was carried. The following is a record of these proceedings on September 15th:

> "Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.
>
> "Col. Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to

depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

"Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts

"Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection, however, against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.

"The motion of Mr. Govr. Morris and Mr. Gerry was agreed to nem: con (see: the first part of the article as finally past)

"Mr. Sherman moved to strike out of art. V. after 'legislatures' the words 'of three fourths' and so after the word 'Conventions' leaving future Conventions to act in this matter, like the present Conventions according to circumstances.

"On this motion

"N—H—divd. Mas—ay—Ct ay. N—J. ay—Pa no. Del—no. Md. no. Va no. N.C. no. S—C. no. Geo —no. (Ayes—3; noes—7; divided—1.)

"Mr. Gerry moved to strike out the words 'or by Conventions in three fourths thereof'

"On this motion

"N—H—no. Mas. no—Ct. ay. N—J. no. Pa no —Del—no. Md. no. Va. no. N—C. no. S.C. no—Geo —no. (Ayes—1; noes—10)

"Mr. Sherman moved according to his idea

above expressed to annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.''

"Mr. Madison. Begin with these special provisos, and every State will insist on them, for their boundaries, exports, &c.

"On the motion of Mr. Sherman

"N.H.—no. Mas. no. Ct ay. N.J. ay—Pa no. Del—ay. Md. no. Va. no. N.C. no. S.C. no. Geo. no. (Ayes—3; noes—8).

"Mr. Sherman then moved to strike out art V altogether

"Mr. Brearley 2ded the motion, on which

"N.H. no. Mas. no. Ct. ay. N.J. ay. Pa. no. Del. divd. Md. no. Va. no. N.C. no. S.C. no. Geo. no. (Ayes—2; noes—8; divided—1.)

"Mr. Govr Morris moved to annex a further proviso—'that no State, without its consent shall be deprived of its equal suffrage in the Senate'

"This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."

II Farrand, 629-631.

It is thus conclusively shown that not only, in accordance with familiar principle, should exceptions to the amending power not be implied, but that the particular limitation which the State of Rhode Island desires to engraft upon Article V of the Constitution, to-wit, that no amendment should be made which derogates from the police power of the State, was discussed in the Constitutional Convention and that the proposal to insert a proviso to that effect was voted down. There can be

no doubt but that the Convention was unwilling to place such a restriction upon the amending power.

We think that there is also no question but that the only exceptions which the Convention was willing to create were the two express exceptions which appear in Article V.

The comments upon the amending power (as provided in Article V), which immediately followed the Constitutional Convention, are most illuminating. In the North Carolina Convention Mr. Iredell pointed out that the amending power was "one of the great beauties of the system, and should strongly recommend it to every candid mind." He pointed out as a "most happy circumstance" that there was "a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people." Mr. Iredell's comments in the North Carolina Convention are as follows:

> "Mr. Chairman, this is a very important clause. In every other constitution of government that I have ever heard or read of, no provision is made for necessary amendments. The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diffidence of their capacities; and, undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. This, indeed, is one of the great beauties

of the system, and should strongly recommend it to every candid mind. The Constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war. Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people. Let us attend to the manner in which amendments may be made. The proposition for amendments may arise from Congress itself, when two thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two thirds of the legislatures of the different states may require a general convention for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and upon the ratification of three fourths of the States, will become a part of the Constitution. By referring this business to the legislatures, expense would be saved; and in general, it may be presumed, they would speak the genuine sense of the people. It may, however, on some

occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary. It is highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the states consented to them. And in one of these modes, amendments that are now wished for may, in a short time, be made to the Constitution by the States adopting it.

"It is, however, to be observed, that the 1st and 4th clauses in the 9th section of the 1st article are protected from any alteration till the year 1808; and in order that no consolidation should take place, it is provided that no state shall, by any amendment or alteration, be ever deprived of an equal suffrage in the Senate without its own consent. The first two prohibitions are with respect to the census, (according to which direct taxes are imposed), and with respect to the importation of slaves. As to the first, it must be observed, that there is a material difference between the Northern and Southern States. The Northern States have been much longer settled, and are much fuller of people, than the Southern, but have not land in equal proportion, nor scarcely any slaves. The subject of this article was regulated with great difficulty, and by a spirit of concession which it would not be prudent to disturb for a good many years. In twenty years, there will probably be a great alteration, and then the subject may be reconsidered with less difficulty and greater coolness. In the meantime, the compromise was upon the best footing that could be obtained. A compromise likewise took place in regard to the importation of slaves. It is probable that all the members reprobated this inhuman traffic; but those of

> South Carolina and Georgia would not consent to an immediate prohibition of it—one reason of which was, that, during the last war, they lost a vast number of negroes, which loss they wish to supply. In the meantime, it is left to the states to admit or prohibit the importation, and Congress may impose a limited duty upon it.
>
> "Mr. Bass observed, that it was plain that the introduction of amendments depended altogether on Congress.
>
> "Mr. Iredell replied, that it was very evident that it did not depend on the will of Congress; for that the legislatures of two thirds of the states were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such convention, so that they will have no option."
>
> 4 Ell. Deb. 176-178.

Mr. Innes in the Virginia Convention, discussing the power of amendment, remarked that "whatever the spirit of America calls for, must doubtless take place immediately." Mr. Innes said:

> "———. By the paper before you, if two thirds of the states think amendments necessary, Congress are obliged to call a convention to propose amendments, which are to be submitted to the legislatures, or conventions, in three fourths of the states, the acquiescence of which will render them binding. Now, is there not a greater probability of obtaining the one than the other? Will not nine states more probably agree to any amendments than thirteen? The doctrine of chance is in favor of it.
>
> "Unless we in vain look for a perfect consti-

tution, we ought to take it. In vain you will seek, from India to the pole, for a perfect constitution. Though it may have certain defects, yet I doubt whether any system more perfect can be obtained at this time. Let us no longer pursue chimerical and ridiculous systems. Let us try it: experience is the best test. It will bear equally on all the states from New Hampshire to Georgia; and as it will operate equally on all, they will all call for amendments; and whatever the spirit of America calls for, must doubtless take place immediately."

3 Ell. Deb. 636, 637.

The discussion of the amending power by Mr. Madison in the Federalist indicates clearly that in his view the only exceptions were those expressly stated. He said (Federalist, No. 43):

"8. 'To provide for amendments to be ratified by three fourths of the States, under two exceptions only.'

"That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary

> sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it."

It will be noted that Mr. Madison in referring to possible amendments uses the term "*alterations*," which is significant as to his opinion of the sort of amendments which might properly be made.

The text writers agree that no limitation of the scope of the amending power may be implied.

Professor Willoughby says:

> "In scope the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate."
>
> Willoughby on the Constitution, Sec. 227, p. 521.

Story does not suggest that there is any exception to the amending power except as expressly provided. He says:

> "An amendment, which has the deliberate judgment of two-thirds of Congress, and of three-fourths of the States can scarcely be deemed unsuited to the prosperity or security of the republic. It must combine as much wisdom and experience in its favor as ordinarily can belong to the management of any human concerns."
>
> 2 Story on the Constitution, Sec. 1830, p. 600.
>
> See, also, 1 Hare on Constitutional Law, p. 30.

(d) The enormity of the proposition now advanced that this Court should imply a restriction upon the amending power, in the teeth of the express provisions of Article V, and in violation of the recorded intent of the framers of the Constitution, is apparent. If a restriction were implied it would operate as well with respect to the action of a Constitutional Convention called under Article V as with respect to amendments submitted by Congress. Such restrictions, established by judicial decree, could not be removed by any process of constitutional amendment which the Constitution affords. As such restrictions would affect the power of amendment, they could not be eliminated by amendment. They would remain unalterable except by the Court itself unless in some manner a new Constitution were adopted outside the exercise of amending power contained in the present Constitution.

If action by officers and acts of Congress are found to be without constitutional authority, that authority may be supplied by appropriate amendment. In holding acts to be unconstitutional, the Court simply applies and enforces the fundamental law, and if it is desired to change the fundamental law so as to authorize the legislation found to be prohibited, that change can be effected in the manner prescribed.

But if the Court should imply a restriction with respect to the power of amendment itself, there is no remedy. The action would be unalterable save by the Court itself.

We submit that the conception involved in the bill of complaint, that an amendment duly submitted by Congress on the vote of two-thirds of each House, and duly

ratified by the Legislatures of three-fourths of the States, is still subject to judicial review, and may be held for naught through judicial action by virtue of a process of implied restrictions upon the amending power—restrictions which thus set up by judicial decree would be unalterable by any constitutional process—is a conception of the most extravagant character and opposed to the fundamental principles of our government. No principle of judicial action can possibly be invoked for sustaining such an authority. The propriety and advisability of amendments, which are not prohibited by the express exceptions in Article V, are necessarily confided to those through whose action the amendments are to be made.

The Constitution is not a compact between the States. It proceeds directly from the people. As was said by Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 402-405:

> "In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.
>
> "It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretentions to it. It was reported to the then exist-

ing Congress of the United States, with the request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The

> constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.
> * * * * * * * *
>
> "The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

The provision for the amendment of the Constitution, contained in Article V, is an integral part of the system of government proceeding from the people and is as binding upon the States as any other part of the Constitution. The people thus ordained the mode of amendment, and in their own interest they established this power of amendment subject only to the express exceptions set forth in the Constitution itself. Amendments are to be made through designated representatives, but they none the less emanate from the people who have defined the method to be adopted on their behalf. As this Court said in *Dodge* v. *Woolsey*, 18 How. 331, 348:

> "It (the Constitution) is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them; or where the legislatures of two-thirds of the several States shall call a convention for

proposing amendments, which, in either case, become valid, to all intents and purposes, and as a part of the constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress."

Every State in the Union is bound by the provisions of Article V and when an amendment is made as provided in that Article, not contravening the express exceptions contained in that Article, it expresses the will of the people just as definitively from a constitutional standpoint as though every State had approved it. The amendment is the registration of the people's will according to the mode the people themselves have prescribed.

THIRD: If this Court may consider the question whether an amendment not expressly prohibited by the Constitution itself can validly be adopted, it is submitted that there is nothing in the nature of the Eighteenth Amendment which exposes it to the charge of invalidity.

(a) *The adoption of the first ten amendments did not restrict the amending power conferred by Article V.*

The first ten amendments were adopted by the exercise of the amending power conferred by Article V and not in derogation of it. Opposition to the ratification of the Constitution had been largely due to the lack of an explicit bill of rights. The question was raised whether there should be ratification, and amendments should then be adopted under Article V, or there should be insistence on

a new Constitutional Convention to draft a new Constitution in which the bill of rights should find appropriate place. The method used was the submission of the ten amendments by Congress under the provisions of Article V.

Article V itself was not amended. And, not being amended, Article V stood as effective with respect to the manner in which future amendments might be obtained as it had been prior to the adoption of the first ten amendments. These ten amendments themselves, by virtue of the fact that they were amendments, became part of the Constitution and thus became subject to the amending power contained in Article V equally with any other part of the Constitution.

Since the first ten amendments, there have been seven other amendments adopted, apart from the Eighteenth Amendment, and all of these have been adopted in pursuance of Article V. As Article V provided the method of obtaining these amendments, it stands equally today as providing the mode of obtaining other amendments not prohibited by its terms. Article V was not exhausted by the first ten amendments; and, continuing in force, it has full effect for all the purposes for which it was originally designed. It has lost nothing of its authority.

(b) The precise contention of the State of Rhode Island in its bill of complaint is that the Eighteenth Amendment derogates from the exercise by the State of its *police power.*

But it cannot be maintained, in the light of our constitutional history, that constitutional amendments are

inhibited because they restrict the States in the exercise of their police power. It would be sufficient upon this point to refer again to the fact that a limitation upon the amending power to preclude its exercise so as to affect matters of internal police was voted down in the Constitutional Convention of 1787. The framers of the Constitution, with the question up, refused to impose any such restriction upon the power of amendment. Even if it could be conceived that this Court would in any case imply a restriction upon the amending power and thus by judicial decree hold invalid an amendment otherwise duly adopted and not expressly prohibited by Article V, clearly an amendment to which the sole objection is that it derogates from the police power of the State could not be subjected to any such implied restriction.

The police power of the State is after all nothing but the power of government exercised with respect to the health, safety, morals and welfare of its people. The authority confided to the Congress is in large measure of the sort which would fall within the province of State sovereignty if there were no Union. Thus, whether a bridge should be built across the Hudson River at Poughkeepsie may be a matter of serious consequence to the people of the State of New York and except for the Federal Constitution would be viewed as a matter of internal concern. But although the banks of the river connected by the bridge are both within the State of New York, still in view of the exigencies of commerce and navigation the construction of such a bridge was submitted to the control of Federal authority. The whole plan of the Constitution involved in substance a determination as to what extent there should be derogation from State

sovereignty, as to what powers in the interest of all the people should be delegated to the Federal Government and what should be reserved to the States or to the people. The framers of the Constitution expected, as the records of the Convention show, that alterations would be necessary, and the most natural function of amendments would be to alter the authority either of the States or of the Nation in order to effect a better adjustment or arrangement of powers to promote the general welfare. To imply a restriction which would invalidate an amendment simply because it derogates from the police power of the State, and thus to ignore the considerations which have led to a recognition of the relation of the amendment to the general welfare, would be to ignore the essential principles upon which our constitutional system is based and the very purpose of the power of amendment. Nothing can be more germane to constitutional evolution than alterations due to a new or modified conception of the advantage of having State or National power extend to particular subjects. And questions of the political expediency or wisdom of particular changes of this nature could not in any event be considered by this Court.

But the question is foreclosed by our constitutional practice. If the amending power could not be exercised, as provided in Article V, so as to restrict the exercise of police power of the State in dealing with its internal concerns, then this Court has acted without authority in its almost daily application of the due process clause of the Fourteenth Amendment to State legislation.

The Fourteenth Amendment provides that no State "shall deprive any person of life, liberty or property without due process of law; nor deny to any person with-

in its jurisdiction the equal protection of the laws." This establishes a limitation upon State power in matters of police, with respect to the authority of the State to deal with its internal concerns. The point is not met by the statement that the due process clause does not invalidate State action unless it is palpably arbitrary, or that the equal protection clause does not prevent classification unless it be found to be without any reasonable basis. The fact remains that these clauses subject the action of the State to Federal scrutiny and to the determination of the validity of such action through the Judicial Department of the National Government. The States have provisions in their own constitutions prohibiting deprivation of life, liberty or property without due process of law, but what is controlling under the Fourteenth Amendment is not the State's conception of due process, but the Federal conception. The amendment obviously places a Federal restriction upon the exercise of the police power of the States, that is, of the exercise of State authority over matters of internal concern although it is deemed by the State to be an exercise of its sovereign power with respect to the health, safety, morals and welfare of its people.

Nor is it important that action of this sort by the State is rarely invalidated under this clause of the Fourteenth Amendment. It is sufficient to point out that it is invalidated when it does not meet the requirements of the Fourteenth Amendment as applied by this Court.

Thus, in *Eubank* v. *Richmond*, 226 U. S. 137, a municipal ordinance, passed under the authority of Virginia Laws 1908, p. 623, required the Committee on Streets, upon the request of owners of two-thirds of the abutting

property, to establish a building line on the side of the square on which such property abutted, not less than five nor more than thirty feet from the street line. This was certainly a matter of internal concern, but the ordinance was held unconstitutional under the Fourteenth Amendment.

In *Buchanan* v. *Warley*, 245 U. S. 60, it was held that an ordinance which forbade colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons was unconstitutional as a deprivation of property without due process of law. It was urged that the measure was justified under the police power in that it tended to promote the public peace and to maintain racial purity. But the Court, applying the Federal Constitution as the supreme law of the land, held that the Fourteenth Amendment prevented such an exercise of State power.

In *Adams* v. *Tanner*, 244 U. S. 590, the State of Washington, reciting in the Act that it was exercising its police and sovereign power, declared it to be unlawful for employment agencies to receive fees from the workers for whom they found places. The Act was held invalid under the Fourteenth Amendment.

See also *Truax* v. *Raich*, 239 U. S. 33.

It is unnecessary to give numerous illustrations. What is more inherent in State sovereignty than the power of taxation for the support of the State government, yet in *Central of Georgia Railway Company* v. *Wright*, 207 U. S. 127, it was held that the tax system provided by the Political Code of Georgia as construed by the highest Court of that State was invalid because it did not afford due process of law. The Supreme Court

of Georgia thought that the system was valid, but the Fourteenth Amendment was invoked and the decision reversed because of the supremacy of that provision which was added to the Federal Constitution through the exercise of the amending power. It is idle to say, in the face of the operation of the Fourteenth Amendment, that the amending power does not extend to amendments to the Federal Constitution which operate as a restriction upon State authority in matters of internal police. It is no answer, as already suggested, to say that the Amendment only restricts State action that is in conflict with fundamental conceptions of justice. The point lies in the recognition of the Amendment as a limitation on State sovereignty in matters of police. Enforcing the Amendment as a part of the Constitution necessarily carries the principle that the subject of internal police of the States has not been removed from the amending power conferred by Article V; and if that subject is within the range of the amending power, the exercise of the power in relation to that subject, as well as others, is necessarily confided to the judgment of those representatives of the entire people through whose action, as prescribed, amendments may be made.

Even with respect to the right of suffrage, the exercise of the amending power under the Federal Constitution has extended Federal authority into the States, so as to invalidate State action establishing the qualifications of voters. Thus, in *Guinn* v. *United States*, 238 U. S. 347, the so-called Grandfather Clause of the Amendment to the Constitution of Oklahoma was held to be void because it violated the Fifteenth Amendment to the Con-

stitution of the United States, in prohibiting the States from abridging or denying the right of a citizen of the United States to vote, on account of race, color or previous condition of servitude. And in *Myers* v. *Anderson*, 238 U. S. 368, it was held that the operation of the Fifteenth Amendment extended to municipal elections. The effect of the Thirteenth, Fourteenth and Fifteenth Amendments upon the institution of slavery within the States, an "internal concern" of which the framers of the Constitution were not unmindful, cannot be overlooked, and we submit that this consideration conclusively disposes of the complainant's contention.

(c) Finally, it has been urged that a constitution is a framework of government and that constitutional amendments cannot properly be adopted under Article V which do not pertain to the framework of government as distinguished from provisions *which operate directly upon the rights and status of individuals.*

It has already been noticed that from the standpoint of those who drafted the Constitution the amendments contemplated in Article V were what might be deemed to be "*useful alterations*" (Federalist, No. 43). There was no requirement that these useful alterations should be limited to the mere framework of government. So to hold would be to establish a criterion with respect to *form* for which the Constitution gives no warrant.

It is sufficient to point out that the distinction contended for cannot be maintained in the light of our Constitutional history. The Thirteenth Amendment operated directly upon the rights and status of persons.

While it empowered the Congress to enact legislation to carry out its provisions, it was self-executing. It did not relate simply to the framework of government by making an additional grant of legislative power, but it directly affected the liberties and rights of individuals within the States and restrained all those who sought to maintain a condition of servitude. The Thirteenth Amendment provided:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

It was said of this Amendment in the *Civil Rights Cases*, 109 U. S. 3, 20:

> "This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment *is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.*" (Italics ours.)

Again, this Court said in *Clyatt* v. *United States*, 197 U. S. 207, 216, referring to the Thirteenth Amendment:

> "This amendment denounces a status or condition, irrespective of the manner or authority by which it is created."

See, also *Bailey* v. *Alabama*, 219 U. S. 219.

The attempt to establish a restriction upon the amending power by confining it to amendments relating to the "framework of government" is to sacrifice constitutional history to a theory which has no constitutional sanction.

If, as our constitutional practice shows, the amending power has actually been exerted in restricting the exercise by the States of their police power, their sovereign control over internal concerns, and also by adding provisions to the Constitution which operate directly upon the rights and status of persons within the States, upon what ground may the Eighteenth Amendment be invalidated by judicial decree through the implication of a restriction upon the amending power?

The truth is that there is nothing left but a question of political policy with which this Court has no concern. If any restriction upon the power of amendment could be implied, there could be no implication in the sense of a rule of law which would justify a judicial decree denying validity to this Amendment. It is submitted that the present attempt to set up criteria for judicial decision with respect to implied limitations upon the amending power serves only to point to the undesirability from any standpoint of judicial action of that sort and to demon-

strate the wisdom of the framers of the Constitution in refusing to limit the scope of the power of amendment except by clearly defined provisos as expressly set forth in Article V.

The bill of complaint should be dismissed.

Respectfully submitted,

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J. S. MANNING,
Attorney General of the State of North Carolina.

CHAS. I. DAWSON,
Attorney General of the State of Kentucky.

ADOLPH V. COCO,
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ELE STANSBURY,
Attorney General of the State of Indiana.

J. Q. SMITH,
Attorney General of the State of Alabama.

GUY H. STURGIS,
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JOHN D. ARBUCKLE,
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Attorney General of the State of Michigan.

VAN C. SWEARENGEN,
Attorney General of the State of Florida.

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Attorney General of the State of Oregon.

RICHARD T. HOPKINS,
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Attorney General of the State of West Virginia.

LEONARD FOWLER,
Attorney General of the State of Nevada.

CLARENCE A. DAVIS,
Attorney General of the State of Nebraska.

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W. L. WALLS,
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DAN B. SHIELDS,
Attorney General of the State of Utah.

WILEY E. JONES,
Attorney General of the State of Arizona.

CHARLES E. HUGHES,
of Counsel.

NOTE.—Authorizations from the States of Mississippi, Colorado and Idaho, to include them among the States for which this brief is presented, were received after service of the notice of motion for leave to file.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 29, Original.

STATE OF RHODE ISLAND,
Complainant,

vs.

A. MITCHELL PALMER, Attorney-General, and
DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

NOTICE AND PETITION FOR LEAVE TO FILE A BRIEF AS AMICI CURIÆ

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 29, Original.

STATE OF RHODE ISLAND,
Complainant,

vs.

A. MITCHELL PALMER, Attorney-General, and
DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

NOTICE OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

YOU WILL PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled original suit and also as counsel for the United States Brewers' Association, likewise interested in pending litigations in the District Courts of the United States, will move the court at the opening of the court on Monday, the eighth day of March, 1920, or as soon thereafter as counsel can be heard, for leave to file a brief as amici curiae, and for such other or further relief as may be proper.

New York, March 3, 1920.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel.

To:

Hon. HERBERT A. RICE,
Attorney General of the State of Rhode Island,
Providence, Rhode Island.

Hon. ALEXANDER C. KING, Solicitor General, and

Hon. WILLIAM L. FRIERSON, Assistant Attorney General, Department of Justice, Washington, D. C.

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 29, Original.

STATE OF RHODE ISLAND,
Complainant,

against

A. MITCHELL PALMER, Attorney-General, and
DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully petition this Honorable Court for leave to file a brief as *amici curiae* in the above entitled suit.

Your petitioners apply as counsel for the United States Brewers Association and as counsel for the plaintiff in a cause now pending in the United States District Court for the District of New Jersey, entitled "Christian Feigenspan, a corporation, plaintiff, against Joseph L. Bodine, United States Attorney, and Charles V. Duffy, Collector of Internal Revenue, defendants."

The issues presented in said above mentioned suit include the determination of the validity of the alleged eighteenth amendment to the Constitution of the United States, as well as the validity of the Act of Congress of October 28, 1918, whose short title is the National Prohibition Act.

Your petitioners' clients have large property interests which would be affected by the decision of the questions involved in the above mentioned suit of the State of Rhode Island. The said corporation, Christian Feigen-

span, has invested in its business of brewing beers over $4,000,000, and the similar business investments of the other members of the United States Brewers Association amount in the aggregate to over one hundred million dollars.

Notice of this application and a copy of the brief have been served upon the counsel for the respective parties in the above entitled suit.

All of which is respectfully submitted for the consideration and action of the court.

Washington, D. C., March 8, 1920.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of Counsel.

Office Supreme Court, U. S.
FILED
MAR 8 1920
JAMES D. MAHER,
CLERK

Supreme Court of the United States.

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vs.

A. MITCHELL PALMER, Attorney-General, and
DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

APPENDIX TO BRIEF OF AMICI CURIÆ.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
ROBERT CRAIN,
BERNARD HERSHKOPF,
Of counsel for *amici curiæ*.

APPENDIX

EXTRACTS FROM CASES CONSIDERING THE EFFECT OF THE REFERENDUM PROVISIONS OF STATE CONSTITUTIONS IN RESPECT OF THE MEANING OF THE TERM "LEGISLATURES" IN ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES.

In *State ex rel. Mullen* v. *Howell*, 181 Pac. 920, the Supreme Court of Washington had under consideration the precise question discussed in point III hereof. In the course of an exhaustive opinion then delivered for the court, Chief Justice Chadwick learnedly reviewed the whole subject as follows:

> "It will be noted that the [so-called eighteenth] amendment does not pertain to matters within the original concept of the Constitution, to the definition or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative and which have hitherto been a subject of legislation by the several States under the police power. . . .
>
> "We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders *pro tanto* the sovereignty of the State, gives to the Federal Government a right to enact laws and to enforce them through the Federal courts and it will deny the citizen the protection of some of those guarantees that we have written out of the travail of time into our own Bill of Rights. . . .
>
> "It is argued that inasmuch as article V of the Constitution of the United States provides that a proposed amendment 'shall be valid to all intents and purposes, as part of this Constitution, when ratified by the *Legislatures* of three-fourths of the

several States, or by conventions in three-fourths thereof,' &c., the people have hitherto fixed the manner and form of ratification against which the reserved power of the people of a sovereign State may not prevail. If we are to stand upon the word 'legislatures'; if that word and that alone is the alpha and omega of our inquiry, it follows that the controversy is at an end, but we are cited to no instances where a great question involving the political rights of a people have been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law.

"In the *Oklahoma Bank* case (219 U. S. 104), Justice Holmes frowned upon a like invitation, saying:

"'We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. . . . Judges should be slow to read into the latter [the Constitution of the United States] a *nolumus mutare* as against the law making power.'

"It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several States pass upon the proposed amendments. It is the act of ratification or rejection by the legislative power in a State and not the manner of doing that makes for the result to be accomplished.

"It may be true that it might have been provided that amendments could be made directly by Congress and [that] the submission of amendments for ratification or rejection by the legislatures of the several States at all was a matter of grace upon the part of the whole people when the Constitution was adopted, but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several States of the right to express their legislative will in the manner in which they had then provided or might thereafter provide,

and, when so regarded, as a compact between the States and the Federal Government.

"It is provided in the Federal Constitution that proposed amendments shall be ratified by the legislatures of the States or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the Constitution used the words 'legislatures' and 'conventions,' as terms describing then present institutions, for it is well known that at the time the Constitution was adopted some of the States did not have legislative assemblies.

"Article V can mean no more than this: that no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention or such other method as might thereafter be adopted by the people in the several States.

"If we hold that the words 'legislatures' and 'conventions' do not control the plain purpose and spirit of Article V; that is, that the people shall pass upon a proposed amendment by their representatives if that be the plan provided by them at the time of its submission; or, if not, under such other plan of expressing their will as may not be offensive to the Federal Constitution, we are on solid ground. For the framers of the Constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form; they understood, as we sometimes forget, that 'The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority' (Cooley on Constitutional Limitations, 6th Ed., page 39). Wherefore it may be said that it is the meaning and intent of article V that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the States, and it should not be held that a ratification or rejection by a popular vote under the referendum clause of a state constitution would be contrary

to the provisions of article V, unless it can be said under sound rules of construction that the referendum is offensive to the Constitution of the United States.

"The people of several of the States, having the sovereign right of self-government, excepting only as they may have yielded that right under the Constitution of the United States and its amendments, have adopted the referendum as a rule of government and the only objection that has ever been urged, or that could have been urged against it, is that it violates section 4, article IV, of the Constitution guaranteeing to every State a republican form of government. The Supreme Court of the United States has held that it does not so offend. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

"The fault of disassociating a word or correlative words from the text of a written law and premising a judgment without the warmth of the spirit of that law may be illustrated. If we are wrong, it may well be that a State might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the Federal Constitution. If the people of this State had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might have done), and had provided that all laws should thereafter be initiated by and voted upon by direct vote of the people, or that the legislative functions of the State should be exercised by a council of three and that all their acts should be subject to a referendum at the next succeeding general election, it would follow under the theory advanced to defeat a referendum in this case that a proposed amendment could not be either ratified or rejected in the State of Washington, for there would be no 'legislature' or 'convention' in the sense in which those terms are employed in the Federal Constitution.

"Significance is placed on the word 'conventions,' it being contended that if the word 'legislatures' had been used alone our argument might seem plausible, but the added word 'conventions' necessarily implies

that Congress had in mind a representative body and not legislative authority; but we are inclined to take a broader view.

"It was doubtless intended that 'legislatures' should mean one thing; that is, the legislative authority of the State; and 'conventions' another thing, an extraordinary representative body convened by and in the State for the sole purpose of passing upon the proposed amendment to the Federal Constitution. If it had no other intention in adopting the term 'legislatures' in specifying one of the instrumentalities for passing upon the proposed amendment, than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which would have included the qualified voters also if they so desire. Inasmuch as the constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

"One of the important ideas governing the framers of the national constitution was that amendments to that instrument should be ratified by the States as units, recognizing and preserving the integrity and sovereignty of the States as parties to the compact creating and continuing that constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the 'legislatures' or 'conventions' of three-fourths of the States than that. Certainly it was and is of no concern to the others what sort of legislature any particular State has, so long as it conforms to the scheme of a republican form of government.

"We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum, but we are not without competent authority to prove that the manner or the name attached to the legislative power of the State, whether it be a representative body or the people

themselves, is of no concern to the Federal government.

"In *State ex rel. Schrader* v. *Polley*, 26 S. D. 5, it was contended, inasmuch as it was provided in the Federal Constitution (sec. 4, art. 1) that 'The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof,' that the relator was entitled to have his name go upon the ballot at a general election under an act of the legislature but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there the Constitution of the United States provided that the *legislature should prescribe the times, places and manner* of holding elections, while in the instant case the provision is that the amendment shall be ratified by the legislatures.

"After noting the tenth amendment to the Constitution that 'the powers not delegated to the United States, . . . are reserved to the States respectively, or to the people,' which, by the way, is a declaration that the people of the several States may function their legislative power in their own way, especially so when the ninth amendment, 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,' is regarded; for the right to legislate directly or by representative bodies is a right assuredly retained, and being retained may be exercised in the form and manner provided by the people of a State, the court says:

"'We are also of the opinion that the word "Legislature," as used in section 4, article 1, of the Federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the law-making body or power of the State, as established by the State constitution, and which includes the whole constitutional law-making machinery of the State. State governments are divided into ex-

ecutive, legislative, and judicial departments, and the Federal constitution refers to the "legislature" in the sense of its being the legislative department of the State, whether it is denominated a legislature, General Assembly, or by some other name. Under section 1, article 3, of the state constitution, it will be observed, the people of this State have reserved to themselves, as a part of the law-making power, the right to vote by referendum, upon any law passed by the legislature, with certain specified exceptions, prior to the going into effect of such law, [and] that the exceptions mentioned are "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government or its existing state institutions." It is clear that said chapter 223 is not within any of these exceptions. Under the constitution of this State, the people, by means of the initiative and referendum, are a part and parcel of the law-making power of this State, and the legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term "legislature" has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state, clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency., 822; 25 Cyc., 182), and which, in this State, under section 1, article 3, Const. S. D., includes the people.

. . . . . .

"'In *Baldwin* v. *Trowbridge*, 2 Bart. Contested El. Cas. 46, the minority report in presenting the legal side of the controversy shows the following pertinent language which meets with our approval: "But it was argued that this power was by express terms left, not to the States simply, but to the legislatures thereof, and that this is such a limitation upon the people of the States that they have not power to restrict their legislatures in the exercise of this right, conferred upon them by the Federal Constitution; but I submit, with all due respect, that not only

the history and object of the section under consideration, but the proper definition of the term "legislature," as therein used, show the fallacy of this construction. The "legislature" of the State, in its fullest and broadest sense, signifies that body in which all the legislative power of a State resides, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the Federal Constitution, or such as they themselves may provide by the organic law of the State.'

"*State ex rel. Davis* v. *Hildebrant*, 94 Ohio St. 154, is likewise to the point. The general assembly, being the representative legislative body of the State of Ohio, passed an act on May 27, 1915, redistricting and apportioning the State into several congressional districts. The State had theretofore by an act passed April 28, 1913, been districted and divided. A sufficient number of the people filed a petition for a referendum of the later act. It was submitted to the electors of the State and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act and was not a subject of referendum because section 4, article 1 of the Federal Constitution provided that the times, places and manner of holding elections for members of Congress, 'shall be prescribed in each State by the legislature thereof.' The court put the question:

" 'Does the term "legislature," as used in article 1, section 4, of the Federal Constitution, comprehend simply the representative agencies of the State, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the State, including the power reserved to the people empowering them to "adopt or reject any law" passed by the general assembly under the provisions of section 1, article II of the constitution of Ohio?' After reference to the state constitution, which is in form similar to the seventh [or referendum] amendment to our own, the court says:

" 'These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the senate and house of representatives, the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the "referendum."

" 'While article I, section 4, of the United States Constitution is controlling upon the States in so far as it grants the legislature of the state authority to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by article X of said constitution, "expressly reserved to the States respectively, or to the people."

" 'Webster's New International Dictionary defines 'legislature' as follows: "The body of persons in a State, or politically organized body of people, invested with power to make, alter and repeal laws."

" 'The Century Dictionary defines the same term as follows: "Any body of persons authorized to make laws or rules for the community represented by them."

" 'Under the reserved power committed to the people of the States by the Federal Constitution, the people, by their state organic law, unhindered by federal check or requirement, may create any agency as its law-making body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment of 1912, provided that the *legislative power* of the State should be vested in the general assembly, consisting of a senate and

house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The law-making body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term "legislature" necessarily implies a bi-cameral body. When the term was originally embraced in the constitution the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each, called an executive council. These States later abolished their councils and established a legislature consisting of two branches, and such is the character generally of the various State legislatures today. 1 *Bryce's American Commonwealth*, page 461, note.

" 'The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various State legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote.'

"This case went to the Supreme Court of the United States (241 U. S. 565). That court passed the question of the power of the State to adopt and use the referendum as an instrument of legislative will, 'as obvious,' holding that the State law which had been made subject to the referendum was valid and operative—a conclusion manifestly unsound if the word 'legislature' means a bi-cameral body and that meaning is inflexible under the constitution of the United States, for if that were so, the States would have no power to prevail against it whatever the form of their expression may have been.

"But it is said that the Supreme Court may be unsound in that respect, but is sound in result because the Congress had passed an act, ch. 5, 37,

Stat. 13, making the referendum a component part of the legislative authority empowered to deal with the election of members of Congress. There is nothing in the act of Congress which 'prevents the people of a State from reserving a right of approval or disapproval by referendum of a State act redistricting the State for the purpose of congressional elections.' (syllabus.) But if it were so it would not avail respondent, for the power of the State to act comes from the Constitution and not from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the constitution. Chief Justice White disposed of the controversy when he defined the issues —'The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the *legislative* authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress,' and said: 'The court below adversely disposed of these contentions and held that the provision as to referendum was a part of the legislative power of the State. . . . As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit.'

"It could not have been so held if the act of a *legislature*, as distinguished from legislative authority, was essential under article I, section 4 [of the Federal Constitution]. If that were so the Court must have denounced the referendum in that and all cases where the constitution leaves a matter to the 'legislature' and refused to follow the state court, for its first duty is to the constitution."

In November, 1918, after the *Hildebrant* case, above referred to, had been decided, the Ohio constitution was amended so as to provide that (Art. II, Secs. 1 and 1a)—

> "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States."

Under this provision proceedings for a referendum upon the question of ratifying the proposed eighteenth amendment to the Federal Constitution were duly instituted. It was sought to enjoin these proceedings upon the ground that the foregoing provision of the Ohio constitution was invalid, since the general assembly of the State alone had power to act upon a proposed amendment to the Constitution of the United States. In other words, that the people who had the right of referendum in Ohio were no part of its "legislature" within the meaning of the National Constitution. The Supreme Court of Ohio, however, in *Hawke* v. *Smith*, decided September 30, 1919, overruled this contention, saying in part as follows:

> "In what sense did the makers of the constitution of the United States use the words 'ratification' and 'legislatures' in Article V, which provides for the ratification of proposed amendments to the constitution by the legislatures of three-fourths of the several States? In the use of the term 'ratification' was a legislative act contemplated? . . .
>
> "The functions conferred in different parts of the Federal Constitution upon the legislatures of the States are manifestly dual in their nature. For example, in the election of United States Senators by the legislatures of the several States, as provided by the Federal Constitution, until the recent amendment, the legislature acted as an electing power. It

was not understood to be legislative and in States in which the governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the State in a manner similar to that in which the electoral college represents it in the choice of President. On the other hand, the power conferred upon the legislatures in section 4 of article I of the Federal Constitution, which confers power on the legislature of each State to prescribe the 'times, places and manner of holding elections for Senators and Representatives' is purely legislative, and as already pointed out, in the exercise of that power all the legislative machinery of the State was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under article V, the State participates in an act which amends the Federal Constitution and in that sense performs a federal function. But it does not follow that by the word 'legislature' in that section a *corpus designatus* is meant. It participates in the making of the fundamental law and its act is legislative in character. The making of the constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification, the makers of the Federal Constitution contemplated that all of the agencies provided by the State for legislation should be empowered to act in accordance with the provisions made by the State at the time the action on the ratification should be taken; and that the word 'legislature' in article V is used in that sense."

In accordance with this decision a referendum was thereafter duly held within the State of Ohio and the action of the general assembly of the State nullified at the polls. Nevertheless, Ohio is recorded by the federal authorities as one of the States which has ratified the so-called eighteenth amendment (see Exhibit I to bill of complaint).

In *State ex rel. Hopkins* v. *Amsbury*, decided August 18, 1919, Judge Morning of the District Court of Lancaster County in Nebraska granted a mandamus to compel the defendant officer to permit referendum proceedings to be instituted upon the ratification of the so-called eighteenth amendment in that State. His opinion reads in part as follows:

> "It cannot be that the people of the State reserved the right to review, at the polls, any and all acts of the legislature dealing directly with their own police regulations and, at the same time, intended that the legislature should be left free to surrender, irrevocably, to the National Government the entire control of the same subject, without any power in the electors to review, or recall, the action by which such surrender is made. If this can be done in the matter of abolishing the liquor traffic, it can be done in all other matters and the legislature would thus have the power, in conjunction with the legislatures of the requisite number of other States, to take away from, and place entirely beyond the control of the people of the State, and beyond their power to review at the polls, all other subjects of legislation, even to the extent of so amending the national constitution as to prohibit any State from having in its constitution or laws any referendum powers on any subject. . . . .
>
> "Perhaps there is no other subject of police regulation upon which the people feel more deeply, nor as to which they would be more reluctant to surrender their right to speak, than the one dealt with by the prohibitory amendment. The fact that the people of this State, by constitutional amendment and by appropriate legislation, have adopted State prohibition and are accordingly committed to that policy, is wholly beside the question. The question here presented is not whether the people of this State do or do not favor State or national prohibition of the liquor traffic. The question is whether the legislature has the right and power to speak for them

finally and conclusively on any and all proposed amendments to the national constitution, with no power resting in the people to approve or reject such action at the polls. If this amendment can be ratified by the Legislature and the electors of the State have no power to order a referendum thereon, then, if in the future, an amendment shall be proposed to the national constitution to make the liquor traffic lawful in all the States and to deny to any State the power to forbid it, a future legislature, if so inclined, could ratify it and the people of the State would be without power to review such action through the referendum. The wholesome democratic principle, embodied in our constitution, by which the people retain the power to call for a referendum on all but the excepted subjects of legislation is so far more importance to this, and future generations, than any temporary advantage of gain which might come from any given piece of legislation. . . .

"I am of the opinion that the word 'legislature' as used in article V of the constitution of the United States means that legislative body or power of the State and, in States where the people have reserved the power to order a referendum upon legislative action, the people are a part of the legislative power of the State and are within the meaning of the term 'legislature' as used in the national constitution. Indeed, I think the question quite conclusively foreclosed by court decisions which I could not well ignore without being guilty of unwarranted presumption. See *State* v. *Howell*, 181 Pac. 920; *Schrader* v. *Polley*, 26 S. D. 5; 127 N. W. 848; *State ex rel. Davis* v. *Hildebrant*, 94 Ohio St. 154; 114 N. E. 55; (affirmed by U. S. Supreme Court in 241 U. S. 565, 60 L. Ed. 1172). . . .

"The national constitution does not require that the States shall have any particular form of legislature. The people of the States have the power to abolish their legislatures entirely and to take into their own hands all matters of legislation. They have the power to provide that no legislation shall be enacted by the legislature without first being sub-

mitted to the people for approval. And they have the power to do, as they have in fact done, in all referendum States, namely, to provide that all, or any particular class of legislative acts, shall stand suspended for a specified time after the adjournment of the legislature, and if, during that time, a referendum is duly ordered, the legislation shall remain suspended and inoperative until the next general election and to take effect or not according to the result of the popular vote thereon. The national constitution confers no power upon the state legislature. It gets all of its powers from within the State. Such authority as the legislatures have to ratify amendments to the national constitution is not *mandatory* but *permissive merely*. Congress merely proposes amendments and suggests that, if they shall be ratified by the legislatures of a sufficient number of the States, they become parts of the national constitution. Such amendments are merely proposed to the law-making power of the States, whatever the form that law-making power may assume. If any State should ever abolish its legislature and resort to direct legislation in all instances, it would be absurd to say that it had thereby deprived itself of the power to act upon proposed constitutional amendments.

"But if we were to assume, for the sake of discussion, that the conventional legislative body of the State has the final word in the matter of ratifying amendments to the national constitution, still, it must be admitted that they speak, not for themselves, but for the people of the State. If this be true, does it not follow that the people, in their State constitutions, have the power to prescribe that the action of the legislature, in such matters, shall be *conditional and shall depend upon popular rejection or approval at the polls*, and that until such popular action can be taken the answer of the legislature to the roll call of States *shall not be final but shall remain in abeyance?* That, as I view it, is the exact situation here. Our legislature has answered, in the affirmative, the roll call of the States on this proposed amendment,

but, under our constitution, the answer is not final until the expiration of ninety days from the adjournment of the legislature, and, since the requisite referendum petitions have been presented during that time, *the answer must continue to remain suspended until the matter can be passed upon by the electors of the State at the next general election.* Until such popular vote is taken, it cannot be said that our legislature has ratified said amendment. If the electors at the polls ratify the action of the legislature it becomes final and effective. If the people disapprove the legislative action, it becomes null and void."

Supreme Court of the United States.

October Term, 1919.

No. 29, Original.

STATE OF RHODE ISLAND, *Complainant*,

v.

A. MITCHELL PALMER, ATTORNEY GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, *Defendants*.

Motion For Leave to File Brief as Amici Curiae.

Now come Alexander Lincoln and Michael J. Lynch and move the Court for leave to file, in the above-entitled cause, the brief herewith exhibited, in behalf of George C. Dempsey, a citizen of Massachusetts having large interests as trustee in brewing companies in the State of Rhode Island, and The James Hanley Brewing Company, a corporation organized and existing under the laws of the State of Rhode Island. The James Hanley Brewing Company is plaintiff in a suit in equity against Harvey A. Baker, United States Attorney for the District of Rhode Island, and George F. O'Shaunessy, Collector of Internal Revenue for the District of Rhode Island, Defendants, which suit is now pending in said District Court. Said suit involves the same questions of the constitutionality and validity of the so-called eighteenth amendment of the Constitution

of the United States and of the Volstead Act, so called, as are in issue in the above-entitled suit in which the State of Rhode Island is plaintiff.

ALEXANDER LINCOLN,
MICHAEL J. LYNCH.

Office Supreme Court, U. S.
FILED
MAR 8 1920
JAMES D. MAHER,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1919. No. 29, ORIGINAL.

STATE OF RHODE ISLAND,

Complainant,

vs.

A. MITCHELL PALMER, Attorney-General, and DANIEL C. ROPER, Commissioner of Internal Revenue,

Defendants.

BRIEF OF AMICI CURIAE

ELIHU ROOT,
WILLIAM D. GUTHRIE,
ROBERT CRAIN,
BERNARD HERSHKOPF,
Of counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

NO. 29, ORIGINAL.

STATE OF RHODE ISLAND,
Complainant,

vs.

A. MITCHELL PALMER, Attorney General, and DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

Brief submitted by counsel for the United States Brewers Association as amici curiae by leave of court in opposition to motion to dismiss the bill of complaint filed by the State of Rhode Island.

This brief is submitted by leave of court by the undersigned *amici curiae,* as counsel for the United States Brewers Association, comprising a majority of the brewers of the United States, whose large property interests are involved in the issues on the merits of the above controversy, and who have pending in the District Court of the United States for the District of New Jersey a suit brought to test the validity of the alleged eighteenth amendment and the constitutionality of provisions of the act of Congress of October 28,

1919, the short title of which is the National Prohibition Act. Such suit is entitled *Christian Feigenspan*, a corporation, vs. *Joseph L. Bodine*, United States Attorney, and *Charles V. Duffy*, Collector of Internal Revenue.

The following points are presented and argued, viz:

I. The so-called eighteenth amendment as mere legislation was not within the authority vested in Congress and the legislatures of three-fourths of the States by article V of the Constitution.

II. Article V of the Constitution of the United States does not authorize any amendment which directly or in principle tends to impair and destroy the reserved police or governmental powers of the several States and their right to local self-government.

III. It does not appear that two-thirds of the Houses of Congress deemed this so-called eighteenth amendment necessary.

IV. The so-called eighteenth amendment has not been ratified by three-fourths of the several States.

V. As to the provision of the alleged eighteenth amendment vesting concurrent power in the several States.

VI. The foregoing contentions present justiciable questions.

I.

THE SO-CALLED EIGHTEENTH AMENDMENT AS MERE LEGISLATION WAS NOT WITHIN THE AUTHORITY VESTED IN CONGRESS AND THE LEGISLATURES OF THREE-FOURTHS OF THE STATES BY ARTICLE V OF THE CONSTITUTION.

Article V of the Constitution of the United States provides as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The operative part of the alleged eighteenth amendment reads as follows:

> "SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes *is hereby prohibited.*

"SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

1. *The prohibition contained in the so-called eighteenth amendment is not in its essence a constitutional provision.*

It is apparent that the prohibition contained in the eighteenth amendment is not what would ordinarily be considered a constitutional provision. It does not relate to the powers or the organization of government. It is itself an exercise of the power of government through an ordinary act of legislation similar to laws passed by the legislatures of many States in the exercise of their police power. It is a command purporting to be issued by sovereign authority regulating the conduct of life by private individuals. The following argument is in support of the contention that Congress and three-fourths of the legislatures of the States had no authority to enact such a law, and that their act is a usurpation of authority.

Such contention may be summarized as follows:

(*a*) The authority to amend the Constitution is a continuance of the constitution-making power. That is a power quite different and altogether distinct from the law-making power under the Constitution.

(*b*) A grant of the one power does not include or imply a grant of the other.

(*c*) The natural and ordinary meaning of the words used in article V of the Constitution limit the power granted to the function of constitution-

making as distinguished from ordinary law-making.

(*d*) The purposes of the grant imply the same limitation.

(*e*) Other parts of the Constitution—notably article I—express the same limitation.

(*f*) The existence of authority under article V to enact ordinary laws regulating the conduct of private citizens under color of amendment, would be in several respects so in conflict with the fundamental principles and spirit of the Constitution that such a construction is not permissible.

2. *The present attempt to exercise ordinary legislative power under color of amendment to the Constitution is wholly novel.*

Neither in the Constitution nor in any of the amendments adopted since the Constitution took effect has any such action been attempted.

The thirteenth amendment has a certain resemblance in form, but none in substance, for it dealt with the subject matter of three provisions of the Constitution (article I, secs. 2 and 9, and article IV, sec. 2. See also article V itself).

It was not a prohibition relating to the conduct of individuals. It was not a false imprisonment statute. It was a limitation upon the powers of government to create a status which could be created only by law. Lord Mansfield in *Somerset* v. *Stewart*, 20 State Trials 1, 82 (1772). Indeed, it was held judicially in Massachusetts as early as 1781 that slavery was contrary to the Massachusetts Declaration of Rights (Mass. Law Quar-

terly, vol. II, pp. 437-441). The slaves had been set free by the Emancipation Proclamation of January, 1863. This amendment prevented the government of any State, and the government of the United States as well, from ever re-establishing the status of slavery. It not only operated upon governments, but it operated upon them in respect of the essential basis of free government in determining who constituted the free people from whom the government derived its powers and who were to be made the basis of taxation and representation. This provision, with the fourteenth and fifteenth amendments, dealt with one of the most important subjects of the original Constitution. They settled the compromises of the Constitution appearing in the second section of article I regarding the apportionment of representatives and direct taxes, and in the provision of article IV relating to the conflict of laws regarding persons held to service or labor in one State escaping into another. *Slaughter House Cases*, 16 Wall. 36, 67, 68.

Those who assert the validity of this prohibitory law embodied in the alleged eighteenth amendment, passed by employing forms prescribed for the amendment of the Constitution, have thus the burden of supporting a power never exercised or claimed by the framers of the Constitution, or by any of their successors during the whole century and a quarter of government under the Constitution.

3. *The authority to pass such a prohibitory law must be sustained, if at all, as an exercise of a special power granted to Congress and the state legislatures by the terms of article V of the Constitution. It cannot be supported by any idea that the alleged amendment is in any other sense the action of the people of the United States. It has never been submitted to the people of the United States, and they have never acted or had an opportunity to act upon it.*

The Constitutional Convention of 1787 understood very well the difference between referring a question to the people and referring the same question to the state legislatures for their action. The Articles of Confederation had provided that no alteration should be made in them "unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every State." Yet, by the resolutions of the Convention adopted on the 13th of September, it was resolved "that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of delegates chosen in each State by the people thereof under the recommendation of its legislature for their assent and ratification." Journal, p. 370. And article VII of the Constitution then provided that "the ratification of the *Conventions* of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."

This was a clear departure from the terms of the Articles of Confederation governing the Union which the Convention was attempting to make more perfect. It was revolutionary in character, and it was the result of long consideration and debate.

The Virginia plan, which was proposed by Mr. Randolph on the 29th of May, 1787, and which formed the basis of consideration by the Convention, contained the following clause (Journal, p. 70):

> "Resolved that the amendments which shall be offered to the Confederation by the Convention ought at a proper time or times after the approbation of Congress to be submitted to an Assembly or Assemblies of Representatives recommended by the several legislatures to be expressly chosen by the people to consider and decide thereon."

On the 23rd of July, this resolution having been agreed to in Committee of the Whole and being under consideration, Mr. Ellsworth moved to substitute a reference to the legislatures of the States for ratification. Upon that motion debate ensued. Apart from considerations of convenience and the relative probabilities in favor of action in one way or the other, the substantial ground upon which the action finally taken was based, was that a reference to conventions expressly chosen by the people for the purpose of passing upon the Constitution was a reference to the people, and that a reference to the legislatures was not a reference to the people. Madison's notes tell us that (3

Documentary History of U. S. Constitution, pp. 405, 409, 410):

> "Colonel Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the resolutions. The legislatures had no power to ratify. They are the mere creatures of the state constitutions, and cannot be greater than their creators, and he knew of no power in any of the constitutions; there was no power in some of them that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished as the basis of free government."

Mr. Gouverneur Morris said:

> "If the Confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the Federal Compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States the supreme authority, the Federal Compact, may be altered by a majority of them in like manner as the constitutions of a particular State may be altered by a majority of the people of the State."

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions, and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given the power to the legislature to concur in alterations of the Federal Compact, but

there were certainly some which had not; and, in case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only and one founded on the people to be the true difference between a league or treaty and a constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation there were two important distinctions in favor of the latter. One, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise and perfidious one. Two, a law violating a constitution established by the people themselves would be considered by the judges as null and void."

And so the Constitution became the act of the people of the United States instead of the act of the legislatures of the several States. No decision entering into the constitution of American Government has had more momentous consequences than this, for it is the chief cornerstone upon which rests that great line of decisions of this court which have established and confirmed the Nation.

This distinction was stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, in the following language:

> "The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretentions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates,

chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not on that account cease to be the measures of the people themselves or become the measures of the state governments.

"From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties."

And in *Cohens* v. *Virginia*, 6 Wheat. 264, 389, Chief Justice Marshall added:

"The people made the constitution, and the

> people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Nor has the reference of proposed amendments to state legislatures under article V in its practical working proved to be an opportunity for the people of the United States or of the several States to express their will regarding the proposed eighteenth amendment. Not only have the people of the several States had no opportunity to act upon this proposed amendment, but they have been denied the opportunity, and the amendment has been ratified in entire disregard of the limitations which the people of a large number of the States have imposed upon their legislatures for the purpose of securing an opportunity to act themselves upon important subjects.

No legislature of any State is now authorized by the people of the State to make changes in the constitution of the State. The constitutions of twenty-eight Sates expressly reserve to the people themselves the right to make such changes. The constitutions of fifteen States require the action of two successive legislatures even to propose an amendment to their constitutions. The constitutions of twenty-one States expressly reserve to the people the power to approve or reject at the polls upon referendum any act of the legislature, and

provide that any act so referred shall take effect only upon an affirmative vote by the people themselves. There can, of course, be no doubt that the Constitution of the United States is a part of every state constitution. Nor can there be any doubt that the prohibitory law now under consideration and called an amendment to the Constitution of the United States diminishes the police power of every State and impairs every state constitution. *State ex rel. Mullen* v. *Howell*, 181 Pac. 920, 922 (Wash.). There can be no doubt that the referendum provision in the States where it exists is applicable to the enactment of just such a prohibitory law as this on the part of the state legislature. Those who assert the validity of these ratifications do not claim that at the time the so-called eighteenth amendment was proposed it was the will of the people of the United States to be represented in matters of constitutional change by the state legislatures. When legislatures acted upon the proposal, they did so, rightly or wrongly, not because the people of their State chose to speak through them, or were in fact represented by them, but solely in the alleged exercise of the agency or authority granted the state legislatures by article V of the Constitution more than a century ago. In some States the action of the state legislature was in express violation of the commands of the people of the State. Thus, in Florida the state constitution prohibited any state legislature from acting upon a proposed

amendment of the Constitution of the United States unless the legislature had been elected after the amendment was proposed. Article XVI, sec. 19. Yet, a legislature of Florida, one branch of which at least was elected in 1916, before the amendment was proposed, ratified the amendment, and is counted in the list of ratifying States. And in Missouri the state constitution forbids any legislature from ratifying an amendment of the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of that State. Article II, sec. 3. Yet the legislature of Missouri ratified this amendment in direct violation of that command of the people.

Moreover, in some States the action of the state legislature was directly contrary to recent popular votes. In some States (e. g., Ohio) elections have been held since a ratification, and the popular vote has been against such a law as the legislature had seen fit to enact by ratifying the amendment.

This general disregard of any right of the people of the States to a voice in this matter is justified only upon the ground that the state legislatures are not legislating or acting at all under their state constitutions, but that they are executing a special power granted to them by article V of the Constitution of the United States. *Opinion of the Justices,* 107 Atl. 673 (Sup. Ct., Maine). The validity of their action in this aspect must therefore be determined by examining the terms of that power.

4. *The document to be amended is the Constitution of the United States. A Constitution is a special kind of instrument as certain in its character and definite in its limitations as are any written instruments known to the law. The full expression for which this word stands is "The Constitution of Government."* See, e. g., The Federalist, No. 33 (Ford's ed.), pp. 260, 263.

> "When we talk of a Constitution, of a State or Nation, we mean those of its rules or laws which determine the form of its government and the respective rights and duties of the government towards the citizens, and of the citizens towards the government."
>
> 1 Bryce's American Commonwealth, p. 350.
>
> "A Constitution 'is a permanent form of government'."
>
> Story on the Constitution, 5th ed., sec. 352.
>
> "A Constitution is 'that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised'."
>
> Cooley on Constitutional Limitations, 7th ed., p. 4.
>
> "By the Constitution of a commonwealth is meant primarily its makeup as a political organization, that special adjustment of instrumentalities, powers, and functions by which its form and operation are determined."
>
> Jameson, 4th ed., sec. 63.
>
> "It is the form of government delineated by the mighty hand of the people by which certain first principles of fundamental law are established."
>
> *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304, 308.
>
> "Constitution.—A system of fundamental principles, maxims, laws, or rules, embodied

in written documents, or established by prescriptive usage for the government of a nation, state, society, corporation, or association; as the Constitution of the United States, the British Constitution, the Constitution of the State of New York, the Constitution of the Social Club, &c. In American legal usage the Constitution is the organic law of a State or of the Nation, the adoption of which by the people constitutes the political organization as distinguished from the statutes made by the political organization acting under the order of things thus constituted."

Century Dictionary.

"In its modern use *Constitution* has been restricted to those rules which concern the political structure of society. If we take the accepted definition of a law as a command imposed by a sovereign on the subject, the Constitution would consist of the rules which point out where the sovereign is to be found, the form in which his powers are exercised, and the relations of the different members of the sovereign body to each other where it consists of more persons than one. In every independent political society it is assumed by these definitions there will be found somewhere or other a sovereign; whether that sovereign be a single person or a body of persons, or several bodies of persons. The commands imposed by the sovereign persons or a body on the rest of the society are positive laws properly so-called. The sovereign body not only makes laws, but has two other leading functions, viz: those of judicature and administration. Legislation is for the most part performed directly by the sovereign body itself. Judicature and administration for the most part by delegates. The constitution of a society accordingly would show how the sovereign body is composed and what are the relations of its members *inter se*, and how the

sovereign functions of legislation, judicature and administration are exercised."

Encyclopædia Britannica (9th ed.)

"A *constitution* is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps, an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.

"In a much qualified and very imperfect sense every State may be said to possess a constitution; that is to say, some leading principle has prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded; like the hereditary principle in most monarchies, and the custom of choosing the chieftain by the body of the people, which prevails among some barbarous tribes. But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power. The number of these is not great, and the protection they afford to individual rights is far from being uniform.

"In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, until it shall be changed by the au-

thority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void."

Cooley on Constitutional Limitations, 7th ed., pp. 2, 3.

"The primary function of Constitutional Law is to ascertain the political centre of gravity of any given State. It announces in what portion of the whole is to be found 'internal sovereignty', '*supremata potesta*', 'Staatsgewalt', ... In other words, it defines the form of government. . . .

"The definition of the sovereign power in a State necessarily leads to the consideration of its component parts. . . . With reference to all these questions constitutional law enters into minute detail. It prescribes the order of succession to the throne; or, in a Republic, the mode of electing a President. It provides for the continuity of the executive power. It enumerates the 'prerogative' of the king, or other chief magistrate. It regulates the composition of the Council of State, and of the Upper and Lower Houses of the Assembly, when the Assembly is thus divided; the mode in which a seat is acquired in the Upper House, whether by succession, nomination, election, or tenure of office; the mode of electing the members of the House of Representatives; the powers and privileges of the Assembly as a whole, and of the individuals who compose it; and the machinery of law-making. It deals also with the ministers, their responsibility, and their respective spheres of action; the government offices and their organization; the armed forces of the State, their control and the mode in which they are recruited; the relation—if any—between Church and State; the judges and their immunities, their power—if any—of disallowing as unconstitutional the acts of non-sovereign legislative bodies; local self-

government; the relations between the mother-country and its colonies and dependencies. It describes the portions of the earth's surface over which the sovereignty of the State extends, and defines the persons who are subject to its authority. It comprises, therefore, rules for the ascertainment of nationality, and for regulating the acquisition of a new nationality by 'naturalization'. It declares the rights of the State over its subjects in respect of their liability to military conscription, to service as jurymen, and otherwise. It declares, on the other hand, the rights of the subjects to be assisted and protected by the State, and of that narrower class of subjects which enjoys full civic rights to hold public offices and to elect their representatives to the Assembly, or Parliament, of the Nation. . . .

"A Constitution has been well defined as '*l'ensemble des institutions et des lois fondamentales, destinées à régler l'action de l'administration et de tous les citoyens*'."

Holland's Jurisprudence, 11th Edition, p. 365.

"Before proceeding to the task indicated, however, it may be useful to ascertain with precision the distinction between a 'Constitution' or 'fundamental ordinance', and an 'ordinary municipal law'. Both must be denominated laws, since they are equally 'rules of action laid down or prescribed by a superior'. (Worcester's Dictionary, in verb.) Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent

> and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine. Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and express—as we have said—the expedient or the right viewed as the expedient under the varying circumstances of time and place."
>
> Jameson, The Constitutional Convention, sec. 85.

Nor was there any misunderstanding among the people who sent the delegates to the Convention of 1787 as to what a Constitution was.*

At the very beginning of constitution-making in the American States, the legislature of Massachusetts drafted a constitution and sent it to the towns for approval. It was considered in the town of Concord on the 21st of October, 1776, and the town records show that it was—

> "Voted unanimously that the present House of Representatives is not a proper body to form a Constitution for this State. And voted to choose a Committee of five men to make answer to the question proposed by

* Madison (Works, vol. IX, p. 383): "The constitution is a bill of powers." See also The Federalist, No. 53 (Ford's ed.), pp. 354-5; *id.* No. 41, p. 260, and No. 45, p. 309.

the House of Representatives of this State, and to give the reasons why the town thinks them not a suitable body for that purpose. . . . And the Committee reported the following draft, which being read several times over for consideration, it then was read Resolve by Resolve, and accepted unanimously in a very full town meeting. The reasons are as follows:—

"Resolved 1st, that this State being at present destitute of a properly established form of Government, it is absolutely necessary that one should be immediately formed and established.

"Resolved secondly, that the supreme Legislative, either in their proper capacity or in joint committee are by no means a body proper to form and establish a Constitution or form of government for reasons following, viz.: First, because we conceive that Constitution in its proper idea intends a system of principles established to secure the subject in the possession of and enjoyment of their Rights and Privileges against any encroachment of the Governing Part. Secondly, because the same body that forms a Constitution have of consequence a power to alter it. Thirdly, because a Constitution alterable by the Supreme Legislative is no security at all to the subject against the encroachment of the Governing Part on any or on all their Rights and Privileges.

"Resolved, thirdly, that it appears to this town highly expedient that a Convention or Congress be immediately chosen to form and establish a Constitution by the inhabitants of the respective towns in this State being free and twenty-one years and upward, in proportion as the Representatives of this State were formerly chosen; the Convention or Congress not to consist of a greater number than the House of Assembly of this State heretofore might consist of, except that each town and

district shall have liberty to send one Representative; or otherwise as shall appear meet to the inhabitants of this State in general.

"Resolved fourthly, that when the Convention or Congress have formed a Constitution they adjourn for a short time, and publish their proposed Constitution for the inspection and remarks of the inhabitants of this State.

"Resolved fifthly, that the Honorable House of Assembly of this State be desired to recommend it to the inhabitants of this State to proceed to choose a Convention or Congress for the purpose above mentioned as soon as possible."

Roger Sherman Hoar in The Constitutional Review, April, 1918, p. 97.

See also: *McCulloch* v. *Maryland*, 4 Wheat. 316, 407; *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, 227; *Taylor* v. *Governor*, 1 Ark. 21, 27; *Commonwealth* v. *Collins*, 8 Watts (Pa.) 331, 349.

5. *The instrument framed by the Constitutional Convention of 1787 answered strictly to this conception of the nature of a constitution. It dealt solely with the powers of government.*

It is needless to recount the familiar story of the Confederation of 1778, the complete failure of the Congress of the Confederation to govern through lack of power, the chaos which had resulted, and the imminent danger that the American experiment in self-government would end in anarchy. The Federalist, No. 15 (Ford's ed.), pp. 87 *et seq.*

The recommendation of the Annapolis Convention of 1786, the act passed by the Confederate Congress on the 21st of February, 1787, recom-

mending to the States to send delegates to the Philadelphia Convention, every act passed by the legislatures of the several States, and the credentials of every delegate to the Convention, stated the purpose of the Convention and the duties and powers of the delegates in terms addressed solely to such action as should "render the Federal Constitution adequate to the 'exigencies of government and the preservation of the Union' ". The first in order of time were the credentials from the State of New Hampshire, and they illustrate all the rest. They were as follows:

> "And whereas the limited powers which by the Articles of Confederation are vested in the Congress of the United States have been found far inadequate to the enlarged purposes which they were intended to produce, and whereas Congress hath by repeated and most urgent representations endeavored to awaken these and other States of the Union to a sense of the utterly critical and alarming situation in which they may inevitably be involved unless timely measures be taken to enlarge the powers of Congress that they may be thereby enabled to avert the dangers which threaten our existence as a free and independent people, Be it therefore enacted that John Langdon &c. be and hereby are appointed commissioners to confer with such deputies as are or may be appointed by the other States for similar purposes, and with them to discuss and decide upon the most effectual means to remedy the defects of our Federal Union and to procure and secure the enlarged purposes which it was intended to effect."

Accordingly, the Constitutional Convention that met in Philadelphia performed its proper

task. The Constitution which was agreed upon and proposed granted enlarged powers to the government of the Union. It distributed those powers and directed how they should be exercised. It imposed limitations on the powers granted and upon the powers reserved for the protection of those inalienable rights to secure which governments are instituted. Nowhere in any of the acts preliminary to the Convention, or in any action taken by the Convention, or in any proposal or argument made in the Convention, was there any suggestion that the Convention itself should exercise any legislative power of government, or should propose the exercise of such a power in connection with the Constitution by any legislature or convention or people acting upon the Constitution. The sole and exclusive function of the delegates, the Convention and the ratifying bodies, was the formation of a government adequate to the exercise of all useful power, and never themselves to exercise powers in lieu of or under the government so formed.

Therefore, when the Constitution was formed, Justice Patterson could properly say of it:

> "What are legislatures? Creatures of the Constitution. They owe their existence to the Constitution. They derive their power from the Constitution. It is their commission; and therefore all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves in their original sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate

capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit within which it must move. In short the Constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve." *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304, 308.

And so, Chief Justice Marshall could say in *Marbury* v. *Madison*, 1 Cranch 137, 175:

"The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established, to decide it.

"That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what pur-

pose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society."

It follows, therefore, that the thing to be amended under the terms of article V of the Constitution of the United States would be the form of government, the distribution of the powers of government, and the regulation of the exercise

thereof, which made up "The Constitution of Civil Government" of the United States.

6. ***The authority to amend granted by article V is necessarily limited to changes in this grant, distribution and regulation of powers which made up the Constitution, and it did not confer upon the amending authorities or agents the right themselves to exercise the legislative power of government.***

7. *The word "amend" has a necessary relation to some particular thing which is to be amended. The word has no meaning whatever except in relation to that thing. The change for better or worse which is called an amendment must be a change in the particular thing amended. An addition or supplement is not necessarily an amendment.*

The necessary relation of amendment to the thing to be amended is ordinarily expressed by the rule that amendments must be germane. A legislative body may have power to legislate upon two different subjects and may incorporate its enactments upon both in the same bill or resolution, but the provisions relating to one subject may not be in any sense an amendment to the provisions relating to the other subject. There are then two separate exercises of legislative power, neither one depending upon the other.

The function of an amendment was well stated in an opinion by the Attorney General of Pennsylvania rendered in 1883, as follows:

> "To amend a thing, as defined by Webster, is to change it in any way for the better; to remove what is erroneous, superfluous, faulty, and the like, to supply deficiencies, to substitute something in place of what is removed. The word is synonymous with 'correct', 'reform', 'rectify'. An amendment, therefore, is a change or alteration for the better, a correction of faults or errors, an improvement, a reformation, an emandation. It necessarily implies something upon which the correction, alteration, improvement, or reformation can operate, something to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended. In respect to the amendment of a charter of a corporation the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify, or alter something in the original charter, it is not properly speaking an amendment to that charter." *In re Pennsylvania Tel. Co.*, 2 Chester County Rep. 129. See also 2 Morawetz on Corporations (2nd ed.), sec. 1096.

The rule that amendments must be germane to the thing amended was in force and well understood in the United States when the Constitution was adopted. Thus, the Continental Congress had adopted the following rule as early as July 8, 1784:

> "No new motion or proposition shall be admitted under color of amendment as a substitute for the motion or proposition under debate until it is postponed or disagreed to." 5 Hinds' Precedents, secs. 5753, 5767.

The First Congress under the Constitution on the 7th of April, 1789, readopted the rule above

quoted, omitting the words "until it is postponed or disagreed to," and that rule was re-adopted in the Revision of Rules on the 3rd of March, 1822, without substantial change, so as to read:

> "No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment";

and this rule remains as section 7 of the present House Rule No. 16, as follows:

> "No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment."

Hinds' Digest and Manual, published in the Second Session of the Fifty-ninth Congress, contains at pp. 326 *et seq.*, an enumeration of propositions offered as amendments to pending bills, but rejected because held not to be germane.

It is to be observed that the form of this rule, established as far back as 1784, is completely decisive upon the question now under consideration, for it denies to any motion or proposition on a subject different from that under consideration, the quality of an amendment, and prohibits its admission "under color of amendment".

There is curious and interesting evidence of the familiarity of the framers of the Constitution with this rule. The reader of the Journal of the Federal Convention will find that on the 10th of September, 1787, the article relating to the amendment of the Constitution was under consideration, and various amendments to the provision were proposed and voted on, when a motion was made

"to *postpone* the consideration of the amendment in order to take up the following". Then followed the provision regarding amendment which now appears in article V of the Constitution. It appears by Madison's Notes, p. 712, that it was Mr. Madison himself who moved this postponement. The same thing occurs scores of times in the proceedings of the Convention. The first motion made on the 30th of May, was of this description. When a provision had been put into such shape that it was considered generally satisfactory, instead of moving it as an amendment or a substitute, the motion was to *postpone* the consideration of whatever was before the Convention and to take up the provision as new matter. This is a form of procedure quite unknown to modern parliamentary practice, and it is plain that it resulted from the rule of the Continental Congress above quoted forbidding the admission under color of amendment of matter different from that under consideration until that is "postponed or disagreed to". Thus the rule that amendments must be germane was followed by the Convention that framed the Constitution and in the adoption of article V itself.

Mr. Madison correctly stated the rule of relation between the amendment and the thing amended in the Convention on the 13th day of August, 1787. The subject under consideration was the power of the Senate to amend money bills. Mr. Madison said (Madison's Notes, 3 Documentary History of the Constitution, p. 518):

> "The words *amend* or *alter* form an equal source of doubt and altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Representatives, it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases the question will turn on the *degree* of connection between the matter and object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled? His apprehensions on this point were not conjectural. Disputes had actually flowed from this course in Virginia where the Senate can originate no bill."

The same view of the character of amendments is followed in judicial procedure. The First Congress under the Constitution in the Judiciary Act of 1789 reproduced the English statute of amendment now appearing in the Revised Statutes, sections 899 to 901 and 954. The amendments authorized all follow strictly the rule of relevancy to the pleading or proceeding to be amended.

Regarding this kind of amendment this court has said:

> "This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or

otherwise lost, it can only be rebuilt, and the word 'repair' is wholly inapplicable to its subsequent reconstruction. The word 'repair', as the word 'amend', contemplates an existing structure which has become imperfect by reason of the action of the elements or otherwise. In the cases of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common law and maritime courts." (*Gagnon* v. *United States*, 193 U. S. 451, 457.

"Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice-chancellor in *Verplanck* v. *The Mercantile Ins. Co.*, 1 Edwards's Ch. R. 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, on its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. . . . To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject." *Shields* v. *Barrow*, 17 How. 130, 144.

The argument in support of article V in the Federalist exhibits this same view of the character of an amendment. Mr. Madison said:

"That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility,

which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other." The Federalist, No. 43 (Ford's ed.), p. 291.

Mr. Hamilton said:

"In opposition to the probability of subsequent amendments it has been urged that the persons delegated to the administration of the National Government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may upon mature consideration be thought useful will be applicable to the organization of the Government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated." The Federalist, No. 85 (Ford's ed.), p. 586.

John Marshall said:

"He tells you that it is an absurdity to adopt before you amend. Is the object of your adoption to mend solely? The objects of your adoption are union, safety against foreign enemies, and a protection against faction.—against what has been the destruction of all republics. These impel you to its adoption. If you adopt it, what shall restrain you from amending it, if in trying it, amendments shall be found necessary? The government is not supported by force, but depending on our free will. When experience shall show us any inconveniences we can then correct it. But, until we have experience on the subject, amendments as well as the Constitution itself are to try. Let us try it and keep our hands free to change it when necessary. If it be

> necessary to change government, let us change that government which has been found to be defective. The difficulty we find in amending the Confederation will not be found in amending this Constitution. Any amendments in the system before you, will not go to a radical change; a plain way is pointed out for the purpose; all will be interested to change it, and therefore all exert themselves in getting the change." In the Virginia Convention, 3 Elliot's Debates, 233-234.

The distinction between the amendment of a constitution and law-making under a constitution was well stated by the Supreme Court of Pennsylvania in passing upon the question whether the amendment provision in the constitution of that State called for submission to the governor of resolutions passed under it. The court said:

> "It is also necessary to bear in mind the character of the work for which it provides. It is Constitution making; it is a concentration of all the power of the people in establishing organic law for the Commonwealth, for it is provided by the article that 'if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall be a part of the Constitution'. It is not law-making which is a distinct and separate function, but it is a specific exercise of the power of a people to make its Constitution." *Commonwealth* v. *Griest*, 196 Pa. St. 396, 404.

And the Supreme Court of Maryland has said in a similar case, relating to an amendment of the Maryland Constitution, that the amending clause has

> "no relation whatever to legislation . . . the two subjects are widely disconnected in

location and substance." *Warfield* v. *Vandiver*, 101 Md. 78.

The sound rule has been accurately stated by the Supreme Court of California as follows:

> "The very term 'Constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests as well as the substantial entirety of the instrument shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." *Livermore* v. *Waite*, 102 Cal. 113, 118, 119.

8. *It appears, therefore, that both the ordinary and natural meaning of the terms used in article V, as well as the purpose to be accomplished, limit the authority granted by the article to changes in the system of government—changes in the distribution and regulation of governmental powers.*

The rule for the construction of the Constitution laid down in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, is plainly controlling in the construction of article V, viz.:

> "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said. If,

> from the imperfection of human language there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given—especially when those objects are expressed in the instrument itself—should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

This rule is of universal application. All grants of power are necessarily limited by the nature of the subject matter to which they relate. *Fletcher* v. *Peck*, 6 Cranch 87, 139; *Loan Association* v. *Topeka*, 20 Wall. 655, 663; *Murphy* v. *Ramsey*, 114 U. S. 15, 44. That is what confines the exercise of the judicial power to questions which are in their nature justiciable, and that is what confines the exercise of the taxing power to things which in the nature of our dual government are subject to taxation. *The Collector* v. *Day*, 11 Wall. 113, 127.

9. ***That the power to amend the Constitution does not include the power of independent legislation by the amending agents is clearly indicated***

by the rulings both in the national and state courts that the proceedings of Congress and of the state legislatures are not ordinary legislation, and for that reason the resolution on the one hand proposing amendments, and on the other ratifying them, do not require to be submitted to the President and to the governors under the general provisions which in terms apply to all bills, orders, resolutions, and votes. Hollingsworth v. *Virginia*, 3 Dallas 378; and the state cases cited, *supra*.

The decisions above quoted in the main applied to constitutional amendments which were properly so-called, but the decisions were based not upon the particular terms of the amendments but upon the character of the power. In denying to the exercise of the power the quality of legislation, they necessarily exclude authority to legislate under the power. As Hamilton said in The Federalist, No. 33 (Ford's ed.), p. 202:

> "What is a power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? What is a legislative power but the power of making laws? What are the means to execute a legislative power but laws?"

10. *That article V granted to the donees of the power no authority to exercise legislative powers under the Constitution is conclusively established by article I of the Constitution.*

This provides in section 1 that—

> "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives,"

and the subsequent sections prescribe the manner in which that power shall be exercised.

This grant of power is exclusive. It admits of no other power of legislation under the Constitution. It necessarily confines the exercise of the power of amendment to its natural and proper function of changing the framework of government, and excludes it from the exercise of legislative powers under that government.

By what authority then is a citizen of the State of Rhode Island prohibited from carrying on his business? What sovereign issues the command? Is it the Government of the United States? This law is an exercise of police power not granted to the Government of the United States, but reserved to the States or the people by the tenth amendment to the Constitution. Is it the State of Rhode Island. The law of Rhode Island permits the business. Is it the people of the United States? The people of the United States have not acted, except as they acted in the adoption of the original Constitution. Is it the people acting through their agents authorized by the Constitution? The Constitution itself expressly excludes those agents from the exercise of legislative power.

11. *The exercise of the power of ordinary legislation through the forms of amendment under article V would be inconsistent with the fundamental principles of the Constitution, because it would prevent the rule of the majority.*

It would be inconsistent with what Hamilton

in the 22nd number of The Federalist (Ford's ed., p. 135) called

> "the fundamental maxim of republican government, which requires that the sense of the majority should prevail."

Under the American constitutional system as it existed prior to the 16th day of January, 1920, the laws which have controlled the conduct of life and fulfilled the function of government to secure the inalienable rights of the individual in the United States, have been always within the control of the majority, subject only to certain universal limitations upon governmental power in favor of individual liberty. Subject to these limitations, the sum total of legislative power under the Constitution was complete. Within the field of the enumerated powers the majority represented in the National Congress was always competent to act. Within the field of the reserved powers of the States the majority in each State was always competent to act even as to constitutional amendments. In this country of rapid development and growth, of constantly changing conditions, of education and new experience in the science of government, of experiment and change, success and failure in legislation, in every generation, in every Congress, at every stage, the people, who are the source of power, were competent to make their laws answer to their judgment from time to time upon the problems of their day. This should continue true no matter how much the distribution of power may be changed by constitutional amendment.

If, however, article V be now construed to confer upon the amending authorities the power to pass ordinary laws which would take effect as amendments of the Constitution, then those laws would be withdrawn from the control of the majority, both in the State and in the Nation. From the time such a law is passed it becomes practically irrepealable and unamendable by the majority. It can only be repealed or amended by a vote of two-thirds of both Houses of Congress and three-quarters of the States. In future years and in future generations the majority of the people of the United States would be helpless to change that law, for three-quarters of the States must unite in order that any change be made. This requirement has no relation to the will of the majority of States, or to the will of the majority of the citizens of the United States, for the one-quarter of the States refusing their consent to a change might be those of the least population, and the overwhelming majority of the people of the country might desire the change but could not bring it about. Under the census of 1910 there were thirteen States which altogether contained less than five per cent. of the population of the United States, whilst twelve States contained fifty-five per cent of the population and much more of the wealth of the country.

If a generation ago a law had been passed in the form prescribed by article V imposing limitations upon the conduct of private life throughout the United States which more than ninety-five per

cent. of the people of the United States had now come to regard as unwise and injurious, the ninety-five per cent. would be helpless as against the opposition of the other five per cent. If this prohibitory law "under color of amendment" to the Constitution be a valid exercise of power under article V, and the people of the United States five years, ten years, twenty years, or more hence come to the conclusion that it was an unwise law, they will then be powerless, for upon that subject the majority will no longer control. Thus, the construction claimed by the advocates of the power is that article V empowers one generation to control future generations, and deprive them of the power of governing themselves according to the will of the majority!

It is not difficult to conjecture that it was in fact for this purpose that the sponsors of the so-called eighteenth amendment determined to pass this law themselves instead of amending the Constitution by adding to the enumerated powers of the general government the power to regulate the manufacture and sale of intoxicating liquors. The practical difference between the two is that if the present attempt succeed, the law will be irrepealable by future majorities. Cooley on Constitutional Limitations, 7th ed., p. 50.

There is an essential difference in respect of the control of the majority between an amendment of the Constitution by new transfer of power to the National Government and an alleged amendment

of the Constitution by the exercise of legislative power on the part of the amending authorities.*

All legislative bodies are but instruments for the making of laws. Whether the law-making power is vested in a National Congress or a state legislature, in one chamber or two, or in the people voting directly under a referendum or initiative, the object is to secure the enactment of such laws as the majority of the people wish to be governed by. That is the object, while the form and method of procedure of the legislative body is but the means.

Whatever be the Constitution and method of procedure of the body exercising legislative power, all free, self-governing peoples see to it that they themselves are always able to control the *exercise* of the power in accordance with the will of the majority. There are strong reasons for making the form of government stable, for having the distribution of powers once agreed upon preserved, unless there be general consent to a change, and for having the powers and duties of particular officers and the limitations upon them well understood and determined by interpretation and usage, so long as the forms and methods agreed upon and prescribed still leave to the people themselves the power to say what laws shall govern them, whether they say it through direct vote themselves, or whether they say it by making their representatives responsive to their will by electing

* In *Sturges* v. *Crowninshield*, 4 Wheat. 122, 196, Chief Justice Marshall emphasized the difference between the mere existence of a power to legislate and its exercise. See also "Life and Correspondence of Rufus King," by C. R. King, vol. I, p. 307.

those who please them and turning out of office those who displease them.

The provisions of article V, therefore, which make the Constitution and any amendment of the Constitution unchangeable except by the consent of three-quarters of the state legislatures, if confined to the make-up of government, would not be in derogation of the control of a majority over their laws.

The distinction between the form of government which is embodied in the Constitution, and the legislative product of government which must always be under the control of the majority if free government is to continue, is well illustrated by the development of free government in Great Britain, which, leaving the King in office, more than a generation ago deprived him of the veto power, and which recently, leaving the hereditary House of Lords in office, has deprived that house of the power to prevent the enactment of laws by the Commons, who are always responsive to the popular will.

If the same limitations upon change, however, are to be applied, not to the form, but to the product of government, so that the laws which issue from the governing power are to be permanently beyond the control of the majority, then the essential quality of free self-government will be destroyed. It is unreasonable to impute to the framers of the Constitution and to the conventions which ratified it a purpose to permit any such result by authorizing, under color of an amend-

ment to the Constitution, the enactment of ordinary laws in such manner as to withdraw them from the control of the majority of the people.

This is emphasized by the interesting circumstance that the clause providing for the passage of a bill over the veto of the President, as originally adopted by the convention of 1787, required a vote of three-quarters of each house, and that this was changed to two-thirds at the very close of the Convention upon the avowed ground that to require a three-fourths vote would make it too difficult to repeal bad laws. Madison's Notes of Sept. 12, 1787, p. 720 *et seq.*

12. *The impression prevailing in many quarters that the kind of legislation under color of amendment which is attempted by the alleged eighteenth amendment is permissible, arises from the fact that many States have pursued the practice of including in their state constitutions ordinary legislative provisions.*

There is, however, a great and radical difference. Subject to the great limitations which political liberty ever requires to be imposed upon all government, the people of a State can do whatever they please with their constitution, and all state constitutions are made by the people themselves acting by majority vote. Every state constitution, however, is subject to alteration at will by the majority of the people of the State, so that the inclusion of an ordinary legislative provision in the same instrument which prescribes the form and regulates the powers of the state government,

does not withdraw any legislation from the control of the majority. It merely substitutes popular legislation for representative legislation. It is merely one form of expressing lack of confidence in the state legislature, and withdraws from them a certain measure of legislative power to be exercised and always controlled by the people. It is in principle the precise opposite to the action which is now attempted under article V of the Constitution of the United States.

The element of negotiation and agreement between the several States in the making of the Constitution involved methods, both in the original making and in the procedure for amendment, wholly inapplicable to the making of ordinary laws, and in this respect is sharply distinguished from constitution-making in the States, where a popular majority always makes and alters at will both the constitution and the laws.

It is indisputable that the Constitution of the United States created a Nation, perpetual and indissoluble, endowed with all the attributes of sovereignty within the field limited in the instrument itself. This instrument received its efficacy not from the state governments, but from the people of the several States, and when that grant of power had been made, the people of all the thirteen States theretofore united under the Confederation, became parts of the one people of the United States, constituting the new Nation, and subject to the authority of the new government. *Legal Tender Cases,* 12 Wall. 125; *Texas* v. *White,* 7

Wall. 700, 720, 724; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 192; *McCulloch* v. *Maryland*, 4 Wheat. 316, 403.

The process, however, by which this result was reached was a process of negotiation between the representatives of the separate States and of consent by the people in the several States. The consents were several and independent as to the people in each State. The new government acquired no authority over the territory of the inhabitants of any particular State until the people of that State had given their assent. That followed necessarily from the independent sovereignty of each State as it existed on the 17th of September, 1787. *Gibbons* v. *Ogden*, 9 Wheat. 1, 187. Accordingly, the Constitution provided that—

> "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."

There was no idea of the exercise of any authority or coercion over the people of any State against their will. When New Hampshire on the 21st of June, 1788, became the ninth State ratifying the Constitution, the new government of the new Nation came into being with no authority over the territory or the people of the remaining four States. The authority of the new government in each of the other States began when that State gave its consent—in Virginia, June 26, 1788, in New York, July 26, 1788, in Rhode Island, May 29, 1789, and in North Carolina, November 21, 1789.

The Constitution thus received its vitality, not from the vote of a majority of the people of the United States, but from the consents of the several people of the different States.

The result of the process was the formation of an indissoluble Union. The consents given were irrevocable. The bond created was the bond not merely of contract, but of allegiance. The method by which this result was obtained was the method, not of coercive law, but of free consent. In that process no account whatever was taken of the will of a majority of the people of the United States as such. The sole question was as to the will of the majority of the people in each separate State to grant away a portion of their power within their own territory. The majority in Delaware counted just as much as the majority in Virginia, because each carried the consent of a State, and the number of individuals had no weight whatever. The same method is continued in the provision for the ratification of amendments, except that while the original provisions proposed by the conventions of 1787 required unanimous consent by all the States, amendments require the consent only of three-fourths. The question is still the same. Will the several States consent to a change in the grant of power to the General Government or in the terms of the grant? In giving or withholding that consent the smallest State in population counts for as much as the greatest. No account whatever is taken of the will of the majority of the people of the United States.

It is manifest that this process, while perfectly adapted to the purpose of correcting errors in the Constitution of Government, was never intended to be applied and cannot be applied to the making of laws for the people of the United States.

The liberty of citizens of Rhode Island within the territory of that State may be controlled by laws enacted directly or indirectly by a majority of the people of that State, or it may be controlled by laws enacted directly or indirectly by a majority of the people of the United States. The distribution of powers in the Constitution determines by which of the two majorities the power of control shall be exercised in every field of possible lawmaking. No construction of the Constitution is permissible which would deliver over the people of any State to the control of a law which is not the command either of a majority of the people of the State or of a majority of the people of the United States. Such an intention would be inconsistent with the essential principles of free self-government, and it cannot be imputed to the makers of the Constitution. It cannot exist in a government which we boast is a "government of the people, by the people and for the people".

13. *A construction of article V which would give to the agents thereby authorized to amend the Constitution authority themselves to exercise the legislative power of government, would be wholly inconsistent with the fundamental character of the National Government as a government of limited powers.*

If such a power as this exists, then there are

three legislative authorities under the Constitution: first, the Congress legislating with the cooperation of the President within the scope of the enumerated powers; secondly, the state legislatures legislating in the several States throughout the field of their reserve powers, and, thirdly, three-fourths of the state legislatures legislating upon the proposal of Congress upon any and all subjects whatever. Inasmuch as the legislative acts of the last mentioned body—if valid—are to be deemed amendments of the Constitution, they are subject to none of the limitations of the Constitution, according to the defendants. If this present legislation be valid, then the people of the United States in adopting the Constitution created an authority competent, without further reference to them, to pass *ex post facto* laws and bills of attainder, to impose direct taxes without enumeration, to levy duties on articles exported from any State, to make discriminating regulations of commerce, to grant titles of nobility, to prohibit the free exercise of religion, to deprive of life, liberty and property without due process of law—all under color of amendment to the Constitution.

While the first amendment provides that—

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances",

we must read instead that—

> "Congress shall make no law respecting the establishment of religion, etc., except with the consent of the legislatures of three-fourths of the States",

and three-fourths of the States, according to the estimated population of the United States in the year 1919, may contain much less than one-half of the population of the United States. The point is not that the Constitution may be amended to permit these things; it is that the power now exists to do these things without changing a word of the Constitution, if the contention of the Government is now upheld.

It is no answer to say that such abuses of power are not likely to happen, and that all power is liable to abuse. The essential basis of every bill of rights is that abuses are likely to happen when fallible men are invested with the powers of government, and that they can be prevented only by express limitations of the power granted. Can it be supposed that in 1787, when every State was suspicious and jealous of possible combinations against it by other States, the people of any State intended that any governmental authority should have power to legislate without their consent in disregard of all those great limitations upon official power which they deemed so essential?

The reason asserted by the men of Concord (*supra*) in 1776 against giving the legislature power to alter the Constitution, applies to-day equally against giving ordinary legislative power

to the governmental agency authorized to amend the Constitution, "*because a Constitution alterable by the Supreme Legislative is no security at all to the subject against the encroachment of the governing part on any or all their rights and privileges.*"

This is the most fundamental, vital and essential separation of powers under the American system. The limitations of the Constitution do not merely protect the States and the General Government against encroachment by each other; they protect all individual citizens against all authority of government in violation of those rules which the people of the United States deem to be essential to their liberty, "against the encroachment of the governing part on any or all their rights and privileges". It was to make that protection certain that the demand for the first ten amendments was so insistent and irresistible. The people of the United Statse intended that there should be no legislative power in government to override these great rules established for their protection.

The people of practically every State represented in the Convention of 1787 had limited their own governments in their own States, composed of men elected by themselves, by the great rules of the Bill of Rights for the protection of their individual liberties. (See the argument of George Mason in the Virginia Convention, 3 Elliot's Debates, pp. 446-447). Are we now to suppose that they intended to empower the governments of

other States to pass laws affecting their liberties without restraint from any of those limitations?

It is no answer to say that the rules might be changed by amendment. The power to change a rule imposing a limitation upon legislation is an entirely different thing from authority to disregard the rule while it remains unchanged. It is improbable that the legislatures of three-fourths of the States, or of any considerable number of States, would consent to the abrogation of any of the great limitations of the Constitution; first, because every rule of limitation is supported by a variety of interests; and, second, because those rules are founded upon general considerations of justice and liberty and right conduct, rather than upon the concrete and particular motives involved in a specific measure of legislation. The calendars of our courts are, however, crowded with cases involving attempts on the part of legislative bodies to avoid or evade limitations of the Constitution, which limitations those same bodies would not for a moment think of abrogating. The distinction between being governed by rules of right conduct and governed by the impulses of particular occasions is a vital characteristic of our constitional system. Constitutional rules are made, principles of action are declared, abstractly, dispassionately, free from the impulses and passions and warping influences of particular measures and particular times, in order that the impulses of the moment may not overcome the principles by which a right-minded people desire to be governed. The dis-

tinction was bred into the common thought and life of the people of the colonies by their religion. To impute to the makers of the Constitution an intention to authorize any governmental agency whatever to adopt specific legislative measures in disregard of the general limitations prescribed without any other change of the limitation than that resulting from the infraction of it, is to ignore the most vital part of the purpose, which created a government of limited powers.

II.

ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES DOES NOT AUTHORIZE ANY AMENDMENT WHICH DIRECTLY OR IN PRINCIPLE TENDS TO IMPAIR AND DESTROY THE RESERVED POLICE OR GOVERNMENTAL POWERS OF THE SEVERAL STATES AND THEIR RIGHT TO LOCAL SELF-GOVERNMENT.

Assuming, *arguendo*, that, notwithstanding the previous arguments, it may be held by the court that provisions essentially legislative in their nature and effect may be made the subject of an amendment to the Constitution of the United States, and thereby removed from the legislative power of the Congress and the several States, it is submitted that the so-called eighteenth amendment is, nevertheless, invalid because constituting an attempt directly and in principle to impair and destroy the reserved police or governmental power of the several States and their right to local self-government, and because any such amendment

would be in conflict with implied limitations. As we have already seen above (see *supra* where *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, and *Cohens* v. *Virginia*, 6 Wheat. 264, 389, are cited), the Congress in proposing an amendment, and the several state legislatures in ratifying it, are acting solely as nominated agents of the people of the United States under a delegated power, as the authorities appointed by the people to amend their Constitution "whenever two-thirds of both Houses [of the Congress] shall deem it necessary." But the language vesting in such agents power to propose and ratify "amendments to this Constitution," should not be construed as conferring unlimited power to amend and destroy the fundamental basis of the federal system or form of government thereby created. Nor should there be any doubt that it was contemplated by the framers and implied in the Constitution itself that the several States, then existing or thereafter to be created, should be sovereign and autonomous in their spheres of local self-government. Hence it is submitted that any amendment which tends directly to destroy the right and power of the several States to local self-government should be held void as in conflict with the intent and spirit and implied limitations of the Federal Constitution adopted by the people of the United States. To repeat Chief Justice Marshall's declaration in *McCulloch* v. *Maryland* (4 Wheat. at p. 403):

> "No political dreamer was ever wild enough to think of breaking down the lines

which separate the States, and of compounding the American people into one common mass."

Half a century later Chief Justice Chase reiterated the same conviction in *Texas* v. *White*, 7 Wall. 700, 725, saying:

> "The perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . . We have already had occasion to remark at this term [in *Lane County* v. *Oregon*, 7 Wall. 71, 76] that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

And in the recent case of *Hammer* v. *Dagenhart*, 247 U. S. 251, 275, Mr. Justice Day, speaking for the court, emphasized this fundamental constitutional principle in the following emphatic language:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as

is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."

The validity of what is known as the eighteenth article of amendment to the Constitution of the United States is further challenged upon the ground that it is not authorized by article V of the Constitution, in that it constitutes essentially a fundamental change in violation of the intent and spirit and implied limitations of the Constitution, and that, if enforcible, its provisions, and the reasoning upon which it would be upheld, would tend to destroy the right of the States to enjoy local self-government and overthrow the federal principle upon which the Constitution was based.

The points now suggested did not arise in connection with any other amendment to the Constitution of the United States, and, consequently, the precise question has not been considered or adjudicated, although controlling principles have been from time to time enunciated.

All the prior amendments to the Federal Con-

stitution were clearly, in their intrinsic nature, germane or relevant to provisions already contained in the Constitution and in harmony with the purpose and spirit of our system and form of government. The courts have, therefore, had no occasion to declare and define the limitations upon the power to amend the Constitution under article V. The people of the United States, who are, of course, the source of all constitutional and political power, may, by the same process which produced the present Constitution and terminated the government created and existing under the Articles of Confederation, make any alteration which they deem proper in their form or system of government. "The people made the Constitution, and the people can unmake it" (*Cohens* v. *Virginia*, 6 Wheat. 264, 389). The Constitution does not limit the powers of the people of the United States. But it is plainly the measure of the power of any agents appointed by the people thereunder. Indisputably "a constitution is the measure of the rights delegated by the people to their governmental agents and not of the rights of the people" (*Rathbone* v. *Wirth*, 150 N. Y. 459, 470). In other words, the people themselves may rescind the "social compact" (*Calder* v. *Bull*, 3 Dall. 386, 388) which is embodied in our Federal Constitution and enter into such new compact as they please. It does not, however, by any means follow that the same unrestrained power is vested in their govern-

mental agents, that is, in two-thirds of the Houses of Congress and the legislatures of three-fourths of the States. The powers of the people of the United States are limited only by that which they may see fit to agree upon; but the powers of the legislatures of some of the States to impose their will upon the people themselves and the other States, even though the latter be but a minority, must have some limitation. As this court declared in *Loan Association* v. *Topeka*, 20 Wall. 655, 663, "the theory of our governments . . . is opposed to the deposit of unlimited power anywhere." It is, therefore, submitted that an amendment tending to destroy the rights of the States to local self-government or to change fundamentally our federal form of republican government, however carefully such an amendment might provide that the Senate should be duly preserved and the equal suffrage of the several States therein respected, could not be validly and legally made to come to pass against the objection and protest of any State.

Manifestly, the Constitution of the United States, like every other written instrument, must in many respects depend for its true construction upon plain implications to be derived from its nature and terms, the historical circumstances surrounding its origin, and, above all, the fundamental purposes of its creation. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *The Collector* v. *Day*, 11 Wall. 113, 127; *Loan Association* v. *Topeka*, 20 Wall. 655, 663; *Downes* v. *Bidwell*, 182 U. S. 244,

290-1; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Rathbone* v. *Wirth*, 150 N. Y. 459, 483-4; *Matter of Fraser* v. *Brown*, 203 N. Y. 136, 143. And equally plainly these implications must affect and modify each of its terms and provisions, including the amending power granted in artivle V. Nothing can, consequently, be made a part of the Constitution by the process of mere amendment by act of governmental agents which is primarily and directly in conflict with its implied limitations or spirit and purposes, or subversive of the federal form of government it establishes.

In order to test the validity of any proposed amendment to the Constitution of the United States, its essential nature, its primary purpose and its direct tendency must be analyzed and determined. The adoption and validation of any amendment is, of course, authority for the adoption and validity of all others of a similar nature and purpose and having the same tendency, wherever they may lead; for it is too well settled to require argument that the test of the validity of a power is, not how it is probable that it will be exercised in particular cases, but what can properly be done under it. *Keller* v. *United States*, 213 U. S. 138, 148; *Colon* v. *Lisk*, 153 N. Y. 188, 194. "Questions of power do not depend on the degree to which it may be exercised" (*Brown* v. *Maryland*, 12 Wheat. 419, 439).

With these propositions in mind, the terms of the so-called eighteenth amendment to the Con-

stitution of the United States should be considered. In section 1 it provides that—

> "The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

Quite indisputably this proposed amendment, if valid, would be self-executing (*Civil Rights Cases*, 109 U. S. 3, 20), and would withdraw from the several States all power and control over the manufacture, sale and transportation in local or intrastate commerce of intoxicating liquors for beverage purposes—a field heretofore exclusively within their absolute and independent control. *In re Rahrer*, 140 U. S. 545, 554-5; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina* v. *United States*, 199 U. S. 437, 453-4; *State ex rel. Mullen* v. *Howell*, 181 Pac. 920, 922 (Wash). The plain object and purpose of the amendment are to destroy the police or governmental power of the several States in respect of a large and important subject matter, and to accomplish this substantial diminution of governmental power and local self-government, not indirectly or as an incidental consequence of some due regulation or re-adjustment of the federal powers bestowed in the original Constitution, but solely and primarily by a direct invasion of the reserved powers of the several States.

If this amendment be valid, the principle which it embodies and the tendency which it establishes and legalizes would authorize the most far-reaching

and revolutionary alterations in our governmental system. The right to manufacture, sell and transport in local or intrastate commerce tobacco, condiments, coffee, grain, meat, cotton, or any other products, which three-fourths of the several States at any time deem objectionable, could then unquestionably be prohibited by constitutional amendment. The right of the States to establish and enforce social distinctions between the races and prevent their intermarriage, which a number of our States firmly believe vital to their peace, order and happiness; the right of the States to regulate any other domestic relation; the right of the States to regulate strikes and lockouts; the right of the States to levy and collect their own taxes for their own purposes; the right of the States to forbid the use of child labor or regulate the hours of labor in the factories within their respective borders; the right of the States to enact employers' liability and workmen's compensation laws for the benefit of their inhabitants,—in a word, the entire right of each of the States to regulate the life, conduct and intrastate affairs and business of its citizens in accordance with its own needs and its own views—may all be destroyed by the action of two-thirds of a quorum of both Houses of Congress and the concurrence of the three-fourths of the legislatures of the States, representing it may be a minority of the people of the United States. It is an inevitable conclusion that, if the so-called eighteenth amendment, which directly and deliberately deprives the several States of a substantial portion

of their respective police powers and revenues, be a constitutional exercise of power, then another amendment may constitutionally sweep away every remaining vestige of the police powers of the State, that is to say, "the powers of government inherent in every sovereignty to the extent of its dominions, . . . the power to govern men and things within the limits of its dominions" (Taney, C. J., in the *License Cases*, 5 How. 504, 583). See, also, *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59, and *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 300.

The case at bar, therefore, resolves itself into this most serious inquiry: May two-thirds of the Houses of Congress and the legislatures of three-fourths of the States validly amend the Constitution of the United States so as to deprive every State of local self-government, that is, of its right to regulate the conduct and welfare of its own citizens? In disposing of this question it should be borne in mind that in many instances neither two-thirds of a quorum of the Houses of Congress nor three-fourths of the several States may represent even a majority of the people of the country; and it is of equal moment to lay out of mind the fortuitous circumstance that this grave and vital question of constitutional law is presented to the court in a cause which happens to concern liquor.

In considering this aspect of our contention, it should be distinctly borne in mind that the fundamental reason for the existence of separate, in-

dependent and sovereign States is the power of internal police and local self-government with which they have always been clothed. *Sligh* v. *Kirkwood*, 237 U. S. 52, 59; *Patterson* v. *Kentucky*, 97 U. S. 501, 503; *Fertilizer Co.* v. *Hyde Park*, *id.* 659, 667; *License Cases*, 5 How. 504, 583. As Mr. Justice Woodbury pointedly remarked in the *License Cases*, 5 How. at p. 628:

> "How can they [*i. e.*, the States] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police?"

The right of a State to have an exercise its police power is the very breath of its being; and without that power it would be a mere name, a mere geographic unit, an empty shell. *Ex parte Rowe*, 59 South. 69, 70 (Ala.). Every other power of a State is directly dependent for vigor and usefulness upon the police power. The right to lay taxes exists only in order to defray the cost involved in exercising the police power; the right to create courts and appoint officials, only in order to furnish the necessary machinery for the exercise of that power and the enforcement of its sanctions. In essence, therefore, as in practical effect, the police power of a State is the State itself: with it, the State is a potent, sovereign, autonomous, self-governing being; without it, the State is nothing but a name. *Stone* v. *Mississippi*, 101 U. S. 814, 819-20; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 567; *South Carolina* v. *United States*, 199 U. S. 437, 451; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558; Hare on American Constitutional

Law, vol. II, p. 766. As declared in the work last cited:

> "The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant."

And Judge Cooley in his work on Constitutional Limitations (7th ed., pp. 243, 263) said:

> "The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government, . . . one which almost seems a part of the very nature of the race to which we belong."

There is much familiar historical matter that shows most convincingly the purpose of the framers of the Constitution, and the original States which adopted it, to establish an indestructible Union composed of indestructible States, and a National Government of enumerated and limited powers, together with a series of State Governments, sovereign and independent in the spheres of power not delegated to or vested in the Nation, and endowed with the same perpetuity which the Articles of Confederation had asserted for the Central Government. Equally clear is the fact that the founders of our form of government intended that it should ever be a true federal system, constituting a Union of free and independent States each possessed of distinct and substantial autonomous and self-governing power as to its own people and its own local self-government, and

not a single, consolidated, centralized government in which the several States were to be but forms of municipal corporations of the Central Government, or less—mere geographical divisions.* Chief Justice Marshall, who was a member of the constitutional convention of the State of Virginia and who participated in a large part of the anxious

* The following are but a few illustrations of the manner in which the States were regarded by the leading statesmen who shared in the delicate task of effecting the ratification of the Constitution by the several States.

Hamilton in the New York convention, June 21, 1788 (Elliot's Debates, vol. II, pp. 267-8): "Were the laws of the Union to new-model the internal police of any state; were they to alter, or abrogate at a blow, the whole of its civil and criminal institutions; were they to penetrate the recesses of domestic life, and control in all respects, the private conduct of individuals—there might be force in the objection [to the plan of the Constitution]; and the same Constitution, which was happily calculated for one state, might sacrifice the welfare of another. The blow aimed at the members must give a fatal wound to the head; and the destruction of the States must be at once a political suicide. Can the National Government be guilty of this madness?"

Oliver Wolcott in the Connecticut convention (Elliot's Debates, vol. II, p. 202): "The Constitution effectually secures the states in their several rights. It must secure them for its own sake; for they are the pillars which uphold the general system."

Pierce Butler to Weedon Butler, October 8, 1787 (Farrand's Records, vol. III, p. 103): "The powers of the General Government are so defined as not to destroy the sovereignty of the individual States."

Pelatiah Webster, often called "the father of the Constitution", in his pamphlet entitled "The Weakness of Brutus Exposed" (Philadelphia, 1787): "It appears then very plain that the natural effect and tendency of the supreme power of the union is to give strength, establishment, and permanency to the internal police and jurisdiction of each of the particular States; not to melt down and destroy, but to support and confirm them all."

Jefferson to Madison, February 8, 1786: "With respect to everything external, we be one nation only, firmly hooked together. Internal government is what each State should keep to itself."

Jefferson to William Johnson in 1823 (Ford's Writings of Jefferson, vol. VII, p. 296): "The capital and leading object of the Constitution was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other states."

Jefferson's first inaugural address (Wayland, Political Opinions of Thomas Jefferson, p. 46): "I deem as essential principles of our government, the support of the state governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican

and difficult labor which led to its adoption therein, has left a clear and emphatic record upon this score. In *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629, he declared:

> "That the framers of the Constitution did not intend to restrain the States in the regu-

tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."

Jefferson to Cartwright, June 5, 1824 (*id.*, pp. 42-6): "They [*i. e.*, the state and federal governments] are co-ordinate departments of one simple integral whole. To the state governments are reserved all legislation and administration in affairs which concern their citizens only, and to the federal government is given whatever concerns foreigners, or the citizens of other states; these functions alone being federal. The one is the domestic, the other the foreign branch of the same government; neither having control over the other, but within its own department." See to the same effect the Congressional Globe, 38th Congress, 1st sess., p. 2993.

Jefferson to Johnson, January 26, 1811 (Wayland, *id.*): "The true barriers of our liberties in this country are our state governments . . . Seventeen distinct States, amalgamated into one as to their foreign concerns but single and independent as to their internal administration."

Sherman and Ellsworth to the Governor of Connecticut, September 26, 1797 (Farrand Records, vol. III, p. 99): "Some additional powers are vested in Congress . . . These powers extend only to matters respecting the common interests of the Union, and are specifically defined, so that the particular States retain their sovereignty in all other matters."

Marshall, C. J., in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

Article I, sec. 1 of the constitution of Texas, adopted 1876: "Texas is a free and independent State, subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States." See also art. II, sec. 3, of the constitution of Missouri to the same effect.

See also Freund on Police Power, secs. 54 and 68; Cooley on Constitutional Limitations, 7th ed., pp. 65, 243, 261, 263; *House* v. *Mayes*, 219 U. S. 270, 282; *South Carolina* v. *United States*, 199 U. S. 437, 454; *McCulloch* v. *Maryland*, 4 Wheat. 316, 410; *In re Rahrer*, 140 U. S. 545, 555; *Matter of Heff*, 197 U. S. 488, 505; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629; *Lowenstein* v. *Evans*, 69 Fed. 908, 911; *Oklahoma, K. M. I. Ry. Co.* v. *Bowling*, 249 Fed. 592, 593-4.

> lation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Similar doctrine has been announced in a long line of decisions. In *Lane County* v. *Oregon*, 7 Wall. 71, 76, Chief Justice Chase said:

> "Without the States in union there could be no such political body as the United States. . . . In many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved."

But who can in reason assert that a State has a "necessary existence" or any "independent authority" under the Constitution, if the provisions of article V permit its governmental powers to be reduced to a mere shadow and its authority over local self-government to nothing substantial? Is the existence of any State "necessary" or its authority in the least "independent", when both subsist but at the sufferance of two-thirds of the Houses of Congress and three-fourths of the legislatures of the States? Can it be doubted that the Constitution would have been rejected if it had been seriously suggested in the state conventions which adopted it that article V granted unlimited amending power and thus placed the minority of the States in peril of virtual extinction through deprivation of all

their substantial powers? No one familiar with our history can for a moment believe that any of the States would have been party to such an agreement. On the contrary, they regarded the amending clause as authorizing merely correctional matters germane to the original instrument.* And if the so-called eighteenth amendment would have been regarded as repugnant to the Constitution when the Constitution was adopted—which it is submitted cannot be doubted—it is so now, for the meaning and effect of the Constitution must at all times be the same. *Ex parte Bain*, 121 U. S. 1, 12; *South Carolina* v. *United States*, 199 U. S. 437, 448; Story on the Constitution, sec. 1908.

It is impossible to reconcile with the decision of this court in *Texas* v. *White*, 7 Wall. 700, 725, quoted above, the contention that the amending power contained in article V of the Constitution is unlimited and may be exercised by some of the States so as to take part or all of the police or governmental powers of an objecting State against its will. If that were true, if the so-called eighteenth amendment were valid, then

* John Marshall in the Virginia constitutional convention said (3 Elliot's Debates, p. 234): "The difficulty we find in amending the Confederation will not be found in amending this Constitution. Any amendments, in the system before you, will not go to a *radical change;* a plain way is pointed out for the purpose."

Amendments to the Articles of Confederation had to be by unanimous consent of the state legislatures (art. xiii), but as under the Constitution amendments were possible by the action of fewer than all, it is clear that they could not properly be "radical changes." They had, therefore, necessarily to be in harmony with, to be germane to, and "within the lines of, the original instrument"; otherwise they were not properly amendments at all. *Livermore* v. *Waite*, 102 Cal. 113, 118-9. See also *Gagnon* v. *United States*, 193 U. S. 451, 457.

notwithstanding the solemn pronouncement of this court to the contrary in *Texas* v. *White,* the States by entering into the Union under the Constitution might suffer "the loss of distinct and individual existence", of "the right of self-government", and of their "separate and independent autonomy", and it can no longer be asserted, as Chief Justice Chase solemnly declared, that "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government", since, under the theory of the defendants, the Constitution in article V carries within itself the power to accomplish the virtual annihilation of the States and their debasement to impotent and all but meaningless geographic designations. The several States could then be constitutionally transmuted into mere municipal corporations of the Central Government, or even into less, and the "indestructible States", which the court declared that "the Constitution, in *all* its provisions, looks to" could be practically destroyed as effective governments under "color of amendment." How can it be said that "the Constitution, *in all its provisions,* looks to . . . indestructible States", when, if the defendants be right, one of those very provisions—namely, article V—at all times had and has within itself the power to compass their practical destruction?

A determined attempt was made in the *Slaughter House Cases*, 16 Wall. 36, 77, to secure the approval of this court of an effort to impair the police power of the States under the pretext that that result necessarily followed from the terms and provisions of the fourteenth amendment to the Constitution, but the contentions to that effect were most emphatically repudiated by Mr. Justice Miller speaking for the court, who said:

> "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?
>
> "All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. . . . The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these conse-

quences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

See also the reasoning of Mr. Justice Bradley in the *Civil Rights Cases*, 109 U. S. 3, 11-15, 19.

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 348, Mr. Justice Harlan, referring to the declarations of Chief Justice Chase in *Texas* v. *White*, quoted above, said:

"These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety,"

and the present learned Chief Justice, on behalf of the dissenting justices, also called attention to—

"The powers of the Federal and state governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate" (*id.*, p. 369).

It is manifest, however, that, if the views of the defendants be now accepted as sound and controlling, these essential underlying doctrines must be at last disregarded, and that the Constitution has in fact failed in its purpose to perpetuate the powers of the States over matters of local self-government. In other words, so far as concerns one of its most clearly revealed purposes and intentions, the Constitution has proved a self-destructive instrument, because within article V lies hidden the means of subverting the most fundamental characteristics of the system of government established by the Constitution.

In *Keller* v. *United States*, 213 U. S. 138, 148-9, the court held unconstitutional an act of Congress which, under the guise of a regulation of interstate commerce, attempted to interfere with the internal affairs of the States, and Mr. Justice Brewer, speaking for the court, used the following language:

> "If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other

> words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank* v. *United States*, 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' "

See likewise *Hammer* v. *Dagenhart*, 247 U. S. 251, 275, cited and quoted from above at pp. 55-6.

It will be observed that in both of these cases the indestructibility of the several States, which is implied in the Constitution, and, indeed, their indestructibility, not as mere geographic units, but as actual, autonomous, locally self-governing sovereignties, was deemed determinative for the purpose of restricting the clause of the Constitution granting to the Federal Government without any express limitation the right to regulate and control interstate commerce. Why, then, is not the same implication effectual to limit and

qualify another part of the same Constitution, namely, the amending clause contained in article V? Certainly, it would be vain to urge, as does the court in the *Hammer* case (247 U. S. at p. 275), that "the maintenance of the authority of the States over matters purely local is . . . essential to the preservation of our institutions" and "the power of the States to regulate their purely internal affairs . . . inherent and . . . never surrendered to the general government," if the States held that authority only temporarily and could be deprived of all of it whenever two-thirds of the Houses of Congress and three-fourths of the legislatures of the States saw fit to take advantage of the power conferred in article V of the Constitution. See also *Kentucky* v. *Dennison*, 24 How. 66, 107; *Guinn* v. *United States*, 238 U. S. 347, 362.

The right of the States to continue as effective local governments which is implied in the Constitution, has been emphatically recognized and enforced as against an express and practically unqualified power sought to be exercised in conflict therewith, in the cases which hold that it is unconstitutional for the Federal Government to attempt to tax the several States or their governmental instrumentalities. *The Collector* v. *Day*, 11 Wall. 113, 124, 125, 127; *United States* v. *Railroad Co.*, 17 Wall. 322, 327; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 584; *South Carolina* v. *United States*, 199 U. S. 437, 453. The *ratio decidendi* of these authorities is not based upon

any express limitation upon the federal taxing power, but solely upon the "necessary implication" which arises out of our dual and federal system of government and "the great law of self-preservation," which the States are entitled to invoke against efforts tending to bring about their ultimate destruction. As Mr. Justice Nelson said in *The Collector* v. *Day, supra:*

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. . . . Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government. . . .
>
> "If the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is

> no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

If, however, article V of the Constitution authorizes amendments directly withdrawing police powers from the States, which their necessarily implied right of self-preservation may, nevertheless, not resist, it would be baseless to argue, as did the court in *The Collector* v. *Day*, that the existence of the States is indispensable under our constitutional system, for the States then would have their being "only at the mercy of" the Congress and the legislatures of three-fourths of the States.

Certainly until the present controversy arose no jurist or statesman would have conceived it possible that under our government the several States of the Union constituted destructible sovereignties. Even during all the bitterness and high feeling preceding the Civil War, the independent sovereignty and indestructibility of the States were not challenged. In 1860 the Republican National Convention which nominated Lincoln wrote the following declaration into its plat-

form (Congressional Globe, 38th Cong., 1st Sess., p. 2985):

> "*Resolved* that the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends."

And in his first inaugural address President Lincoln, referring to this declaration, said:

> "I now reiterate these sentiments. . . . I understand a proposed amendment to the Constitution has passed Congress to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. . . . Holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable."

A scholarly and exceptionally competent historian, George Ticknor Curtis, treating of this subject in his work on the Constitutional History of the United States (vol. II, pp. 160-1), expressed himself as follows:

> "The Ninth and Tenth Amendments are in themselves express fundamental provisions, fixing immutably the reserved rights of the States. If three-fourths of the States were to undertake to repeal them, or to remove them from their place in the foundations of the Union, it would be equivalent to a revolution. There would remain nothing but the dominant force of the three-fourths of the States, and this would soon end in a complete consolidation of the physical force of the nation, to be followed by a different system of government of a despotic character.

> "It seems to me, therefore, that while it is within the amending power to change the framework of government in some respects, it is not within that power to deprive any State, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution, or which the Constitution did not prohibit it from exercising."

It should, moreover, be remembered that the issue now before the court embraces within itself a menace or portend of mischief even more far-reaching than that which is involved in the attack upon the present right of local self-government of the States; the same principle which would uphold the amendment in suit is fraught with menace to the existence of the Federal Government itself. If the power to amend contained in article V of the Constitution is unlimited, it would support an amendment empowering the States to tax the instrumentalities of the Federal Government or an amendment to deprive the Congress of essential legislative powers, which might involve the practical extinction of the "perpetual" and "more perfect Union" which the people erected! It is inconceivable that both the Nation and the States may to all practical intent have their fundamental characters changed or destroyed whenever it pleases two-thirds of the Houses of Congress and three-fourths of the legislatures of the States, which latter may readily represent a comparatively small minority of all the people of the United States. The possibility

of any such outcome should condemn any rule that would permit it.

It is submitted that the establishment and recognition in the Constitution of the two governments, federal and state, plainly implies that neither shall be permitted to destroy the other; that the state power shall not be exerted to overthrow the Federal Government, nor the federal power to impair the existence of the States (*South Carolina* v. *United States*, 199 U. S. 437, 451-2); that, consequently, the States must be preserved, not as mere electoral and administrative districts of a unified and consolidated national government, but as true local self-governing sovereignties, inviolate and indestructible members of a dual, and not a consolidated, system of government, and with a permanent and effectual reason for being, namely, the possession of the power and the right to exercise forever the functions of internal, local self-government.

It is no answer to these contentions to urge that the consequences of destruction herein referred to are not reasonably to be apprehended, that the various governmental authorities must have confidence in each other, and that such mutual confidence will tend to bring about governmental harmony. If we indulge in any such idea, we shall be merely shutting our eyes to ordinary human motives and weaknesses and forget that the struggle for power is the natural law of existence. If once it be decreed that the reserved power of the States may be invaded and that how far the in-

vasion shall proceed is merely a question of policy and discretion, the struggle will never end until the States have been stripped of the last vestige of their substantial powers of local self-government. Usurpation always commences with loud and plausible protestations of good intentions and large promises of moderation and assertions that the encroachment will be limited and go no further. This line of argument, however, was long ago refuted by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 327, 431. It was there also argued that unlimited hostile power on the part of the States need not be apprehended, if the several States and the Nation would only have "confidence" in each other. But Chief Justice Marshall rejected the contention, saying:

> "But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? . . . . This, then, is not a case of confidence, and we must consider it as it really is."

Perusal of the Constitution itself will show that, as Chief Justice Chase declared in *Texas* v. *White, supra* (7 Wall. 700, 725), "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible

States." Every article contains at least one provision specifying some attribute of independent sovereignty as belonging to the several States. Section 2 of article I contemplates an elective state legislature; section 4, a state legislature capable of regulating elections; section 8, a state militia with officers appointed by state authorities, and a state legislature empowered to consent to the sale of state lands to the Federal Government; section 9, a state government with discretion over the migration and importation of persons, and section 10, a state government which, but for the prohibitions in that section, would have power to make treaties, wage war, enact every species of legislation and lay every conceivable kind of tax. Section 1 of article II looks to a State and a state legislature able to appoint presidential electors, and section 2 refers to the "militia of the several States." Article III deals with States capable of having controversies with each other and with third parties, of such a nature as to require judicial action, and also deals with States capable of having citizens of their own. Section 1 of article IV has in view States having public acts, records and judicial proceedings; section 2, States with systems of criminal justice, laws regulating the rights of persons, executive authorities and citizens possessed of privileges and immunities derived from their respective States; section 3, new States to be taken into "this Union" in the future, and section 4, States having and maintaining under "this Union a re-

publican form of government", with legislative and executive authorities charged with the duty of preserving order and safety within the States. Article VI speaks of state judges administering the law "in every State," and of legislative, judicial and executive state officers.

The second amendment refers to the militia of a free State; the tenth, to States with reserved powers; the eleventh, to States so sovereign that individuals may not even sue them without their consent; the fourteenth, to citizens of the States, to elective and appointive state officers of every kind and state debts and state moneys; the fifteenth, to the right to vote within the States, and the seventeenth, to elective state legislatures and to executive authority in such States.

In article V of the Constitution, state legislatures are specifically referred to as part of the machinery or agencies expressly erected by the Constitution for its amendment. But if the police power can be entirely withdrawn from the States by constitutional amendment, they will thereafter need no legislatures at all, since they may then no longer have anything to legislate about; and the machinery intended by the Constitution to be forever available for amending it, might in that event no longer exist, and the Constitution thus thereafter cease to be amendable. The form may then remain but the substance will have vanished.

Again, article V in its proviso "that no State, without its consent, shall be deprived of its equal suffrage in the Senate," necessarily implies and

requires the continued existence of the States, for otherwise their equal suffrage in the Senate could be destroyed with them; and further implies that the States shall at all times exist as bodies capable of consenting,—in other words, as autonomous, self-governing sovereignties. The same views are expressed as follows in Tucker's work on the Constitution of the United States (vol. I, pp. 323-4):

> "The provision which fixed irrevocably the equipollency of each State in the Senate, unless such State surrenders it by its separate consent, is clear evidence that no change in this respect can be made but by a new compact, to which each State, as a distinct factor, must be a party. It proves the continuing and perpetual independence of the State as a primordial political particle, in order to its own protection against the *vox majoritatis*, whether of population or of States. It proves more. If the State was not to be preserved as an equal in sovereignty, despite a difference in population, there is no assignable reason for thus shielding its equality in the Senate against all action but at its own will and at its own consent. . . .
>
> "From this review it is obvious that, without the continuing existence of States and State governments *de jure* and *de facto*, the Federal government itself would cease to be. . . .
>
> "If the States in their full autonomy as independent Bodies-politic are pulled down, the Federal Samson would be destroyed amid their ruins."

An analysis of the previous amendments to the Federal Constitution will disclose that none of them has ever attempted directly and substantially

to invade the police powers of the several States. The first ten amendments "left the authority of the States just where they found it, and added nothing to the already existing powers of the United States." *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Spies* v. *Illinois*, 123 U. S. 131, 166; *Barron* v. *City of Baltimore*, 7 Pet. 243, 250; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 217. They were but express declarations of the intent and effect of the unamended Constitution, and were adopted in order permanently to reassure the people of the States that no encroachments by the Federal Government upon their fundamental rights were being authorized. The eleventh amendment merely further restricted the judicial power of the United States; if anything, it added rather than subtracted from the powers of the several States. The twelfth amendment re-adjusted the procedure of the electoral college; it had no effect upon the States. The thirteenth, fourteenth and fifteenth amendments are discussed below. The sixteenth amendment merely changed the method by which income taxes might be levied by the Federal Government, but it diminished or affected none of the powers of the States. The seventeenth amendment altered the manner in which United States Senators were thereafter to be chosen, but it did not detract in the slightest from the police powers or the sovereignty of the States.

Nor did the thirteenth, fourteenth and fifteenth amendments make any radical change or fundamentally impair the right of local self-government,

when read in the light of their history and primary purpose and correctly understood, as has been frequently held by this court. *Slaughter House Cases,* 16 Wall. 36, 68, *et seq.; Barbier* v. *Connolly,* 113 U. S. 27, 31; *Bartemeyer* v. *Iowa,* 18 Wall. 129, 138; *Civil Rights Cases,* 109 U. S. 3, 11; *Mugler* v. *Kansas,* 123 U. S. 623, 663; *In re Kemmler,* 136 U. S. 436, 448, 449; *In re Rahrer,* 140 U. S. 545, 556; *Guinn* v. *United States,* 238 U. S. 347, 362. In *Barbier* v. *Connolly, supra,* the court said that—

> "Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

These three amendments grew out of the War of the Rebellion. The outbreak of that struggle, of course, laid the Federal Government under the duty of exercising its war powers to the utmost so as to suppress the insurrection. In the prosecution of that purpose federal troops occupied some, and eventually all, of the rebel territory, and, in the natural conduct of the war, seized all such enemy property as could be used against them. Included among this property were slaves, and as it directly tended to weaken the enemy to set free their slaves, the federal forces did so. Finally, the President proclaimed their freedom.

Insofar as that proclamation related to the past, it merely declared an accomplished fact; and insofar as it related to the future, it constituted an order of the commander-in-chief to his military subordinates to be carried out in all the rebel territory within their power. The institution of slavery thus perished as a consequence of the exercise of the federal war power. *Slaughter House Cases*, 16 Wall. 36, 38; *Texas* v. *White*, 7 Wall. 700, 728. This war "power is not limited to victories in the field and the dispersion of the insurgent forces; it carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." *Stewart* v. *Kahn*, 11 Wall. 493, 507. To effectuate the federal war power, to perpetuate its necessary consequences, to prevent the recurrence of any such rebellion, and to remove the very cause thereof, the thirteenth amendment was adopted. It will be observed that its primary purpose and effect were wholly federal.

In this manner the compromise effected in the original Constitution, which had attempted to reconcile slavery with the republican form of government and to experiment with bondage in a land dedicated to freedom, totally failed, and disappeared in the struggle of the Civil War. As a consequence, therefore, of the arbitrament of war, which all must accept however revolutionary in character, it was settled politically in this coun-

try that slavery was inconsistent with any due form of republican government. When, therefore, Congress and the Executive undertook the reconstruction of the seceded States, they required them to set up a truly republican form of government, namely, one in which all men would thereafter be free. In the other States, slavery did not exist, and it was unnecessary to take any steps in respect thereof in those States. If any of them had subsequently attempted to establish slavery, Congress and the Executive, under their duty to guaranty a republican form of government, could take appropriate steps, such as refusing to seat their Senators and Representatives, or using force, in order to compel such States to abrogate slavery and restore the freedom necessary in a true republic.

Without the thirteenth amendment, therefore, the Federal Government, through the Congress and the Executive, had and has power to prevent slavery in any State. It cannot, therefore, reasonably be said that the thirteenth amendment, which merely made explicit this implication and provided additional and more certain enforcement machinery therefor, diminished any of the rights of the several States. That is unquestionably the thought which underlies the declaration in *Barbier* v. *Connolly*, 113 U. S. 27, 31, already quoted, that—

> "Neither the [fourteenth] amendment . . . *nor any other amendment*, was designed to interfere with the power of the State, sometimes termed its police power."

And that also is the reason for the correctness of the many decisions referred to in this point as asserting the indestructibility of the States, which were nearly all rendered after the thirteenth amendment was ratified. Of course, those carefully considered and solemn pronouncements of this court would have been futile, if the court had believed that the substantial powers and separate existence of the several States as local self-governing sovereignties could be partially or wholly destroyed under the precedent created by the thirteenth amendment.

The termination of the actual struggle of the Civil War left the Federal Government with still another constitutional duty to perform in the rebel territory, namely, the duty to restore and guarantee a republican form of government in those States. *Texas* v. *White*, 7 Wall. 700, 727, *et seq.* But no government is in fact free or in truth republican in which the inalienable rights of man are not respected, in which *all* men may not live, be free and hold their own without arbitrary interference by the government and upon a footing of substantial equality. This vivifying principle of free government has never been more forcefully stated than by this court in the leading case of *Loan Association* v. *Topeka*, 20 Wall. 655, 662:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute dis-

position and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

Equality and justice to all freemen in the rebel States had, therefore, to be established and secured (*United States* v. *Cruikshank*, 92 U. S. 542, 555), and, partly to that end, an unambiguous determination had to be made of the status of former slaves, which cases like the *Dred Scott case*, 19 How. 393, had left in confusion. It was

for the accomplishment primarily of those federal ends that the fourteenth and fifteenth amendments were made part of our fundamental law. *Slaughter House Cases*, 16 Wall. 36, 70-1, 72-3.

In order, therefore, to bring about efficient free and equal government in all cases and to assure a really republican form of government in every State, it was necessary to make the essentials of republicanism—equality and due process of law—part of the federal bill of rights, so that they might be at all times available to the individual in judicial tribunals that were always open and could act promptly for his protection and with a due regard to the practical necessities of the particular case. The thirteenth, fourteenth and fifteenth amendments, consequently, were mainly intended to be corrective, and added no new restriction upon the essential powers of the several States, to which their membership in a free republican government had not theretofore already subjected them. They merely made express what was formerly implied in the guaranty of a republican form of government, and provided adequate machinery for the enforcement of those implied obligations. This is certainly the clear inference to be drawn from the following remarks of Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554:

> "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, . . . add anything to

> the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

These amendments are, consequently, germane to and spring out of the federal duty to secure to the States a republican form of government, and such, indeed, was their primary purpose and direct effect. They were never intended to disturb the fundamental relation between the States and the Federal Government, nor in the smallest degree "to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character," nor to make any "departure from the structure and spirit of our institutions" (*Slaughter House Cases*, 16 Wall. 36, 78). As emphatically declared in the authority last cited:

> "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

The utmost that may be deduced from the thirteenth, fourteenth and fifteenth amend-

ments is the conclusion that constitutional alterations may be made which are chiefly and primarily intended to effectuate or fortify the guaranty to the States of a republican form of government, or some other function already vested in the Federal Government, even if their incidental or secondary effect may be to restrict the liberty of the States and their power in a minor degree. But such amendments furnish no warrant for an amendment which directly and substantially invades the essential powers of the several States and is entirely unrelated to any original or fundamental federal purpose.

It is no answer to these contentions to urge that the tenth amendment, which expressly reserves the police powers to the States, is after all but an amendment and as such may be altered like any other provision or amendment. The first ten amendments stand upon their own peculiar ground. They were in fact but the expression of matters claimed to be implied in the original Constitution, and they added no power to the States and subtracted none from the Federal Government. *United States* v. *Cruikshank,* 92 U. S. 542, 552; *Loan Association* v. *Topeka,* 20 Wall. 655, 662-3. If they did not exist, the contentions herein urged would, nevertheless, have the same force and effect; and their amendability is, therefore, to be determined, not by the mere fact that they are termed amendments, but by their intrinsic nature. In other words, if the principles which they announce are of the very essence of free re-

publican government or of our dual form of government to such an extent that changing them would be subverting our governmental system, then they are not proper subjects of amendment by means of the agencies provided in article V of the Constitution. *State* v. *Keith*, 63 N. Car. 140, 144; *Eason* v. *State*, 11 Ark. 481, 491.

It is furthermore quite immaterial whether the tenth amendment was or was not ratified by all or less than all of the original States;* its vital obligation was necessarily recognized and approved by every State when it entered into the Union, which can only remain a true federal union so long as the several States retain the powers the tenth amendment expressly reserves. With the subject-matter of that amendment substantially altered or destroyed, "we may remain a free people, but the Union will not be the Union of the Constitution" (*Coyle* v. *Oklahoma*, 221 U. S. 559, 580).

It has been suggested that the proceedings in the Federal Constitutional Convention of 1787 afford support for the defendants' construction of article V of the Constitution (see Madison's Notes, Farrand, vol. II, pp. 629-31), but investigation will dispel whatever doubt these proceedings may tend to create. It is reported that (*id.*)—

> "Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abol-

* Although the federal records fail to disclose the ratification of the first ten amendmerts by three of the original States, the public records in those States indicate such ratification.

> ishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso [in the amending clause of the proposed Constitution] in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate. . . .
>
> "Mr. Sherman moved according to his idea above expressed to annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'
>
> "Mr. Madison: Begin with these special provisos, and every State will insist on them, for their boundaries, exports, etc."

And thereupon the phrase concerning the internal police of the States was omitted, while the phrase concerning the equal suffrage of the States in the Senate was retained.

Of course, if the latter provision had been stricken out, the equality of the States in the Senate could have been changed whenever two-thirds of the Houses of Congress and three-fourths of the legislatures of the States so desired, because such an equality is not indispensable to a free or republican or federal form of government, any more than is equality of representation in the House of Representatives. If Senators were apportioned to the States as are Representatives, neither the essence nor spirit nor the fundamental principles of our government would be affected. To preserve equality in the Senate, therefore, it was absolutely necessary that the amending clause of the Constitution should be expressly qualified to that effect.

But the police powers of the States, their right to exist and to be immune from the efforts of some of the other States "to do things fatal to particular States, as abolishing them altogether," were clearly implied in the Constitution, as Chief Justice Chase declared in *Texas* v. *White*, 7 Wall. 700, 725. It was, therefore, quite unnecessary to write these fundamental implications into article V. As Madison pointed out, if once that course had been entered upon, every implication would have had to be counteracted and set out in express terms in the article, and no useful purpose be served, but, on the contrary, the large risk would have been incurred of omitting some that were important. That was what he meant, and all that he meant, when he declared—

> "Begin with these special provisos, and every State will insist on them, for their boundaries, exports, etc."

It is reasonably certain that the Constitution would never have been adopted if any responsible member of the Federal Convention had so much as intimated that article V was intended to authorize the debasement and ultimate destruction of the States at the will of some of them only. Consequently, even if Madison at the secret sessions of the Federal Convention had entertained ideas to the contrary, that would be immaterial; the people acted upon the plain meaning of the instrument and intended no such result as is urged by the defendants in the case at bar, and as the people reasonably read the Constitution, so should it be enforced. *State* v. *St. Louis. S. W. Ry. Co.*, 197 S.

W. 1012, 1013 (Tex.); *Alexander* v. *People*, 7 Colo. 155, 167.

It is, however, perfectly clear that Madison himself believed that the sovereignty of the States was fully protected by the implications apparent upon the face of the Constitution. In No. 43 of the Federalist, which has long been attributed to him, he wrote the following concerning the amending clause of the Constitution (Ford's ed., pp. 291-2):

> "The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the *residuary sovereignty of the States, implied and secured by that principle of representation* in one branch of the legislature."

III.

IT DOES NOT APPEAR THAT TWO-THIRDS OF THE HOUSES OF CONGRESS DEEMED THE SO-CALLED EIGHTEENTH AMENDMENT NECESSARY.

The method by which an amendment may be made to the Constitution of the United States is prescribed in article V, and it is there provided that Congress may propose an amendment "whenever two-thirds of both Houses *shall deem it necessary.*" It cannot be doubted that this condition is material. If observed, it assures the States and the people that no amendment will be proposed which does not affirmatively commend itself to the judgment of at least two-thirds of both Houses of Congress as *necessary*. This clause

was undoubtedly intended to provide for a distinct guaranty against hasty, ill-considered and unnecessary alterations of our fundamental law.

The nature of the guaranty should be appreciated. In the first place, it manifestly requires the members of Congress, to the number specified in the Constitution, to do, each for himself, a distinct act of *judgment*, since each must "deem" the amendment necessary. Two-thirds of each House must, consequently, concur in the *judgment* that a particular amendment is in fact and according to their conviction "necessary," before it can be submitted to the legislatures of the several States for their ratifying action. It plainly will not suffice for some or all of the requisite two-thirds of the Houses of Congress to concur in the proposal of an amendment which they do not in fact "deem necessary," merely because their doing so will afford the state legislatures an opportunity to express the will or views of the States thereon. Thus, the members of the Houses of Congress whose votes must be counted to make up the constitutional quota, may not say, "We do not in fact consider the proposed amendment necessary, but we are willing to leave the matter to the state legislatures, and, therefore, we give our votes in favor of the proposition," or, "We are quite indifferent to this amendment, but we are willing to let the state legislatures do what they like about it, and, therefore, we vote in favor of the proposition." The Constitution sought to guard against

this very situation, and it authorized a vote in favor of proposing an amendment only when the condition of the Union and the merits of the particular amendment aroused in the requisite number of Senators and Representatives a conviction of necessity. Manifestly, this was to be an essential condition precedent to the exercise of the power to propose an amendment. It was on that foundation of pre-expressed judgment that the States were to ratify.

These considerations are of the utmost moment in respect of the so-called eighteenth amendment. It is notorious, and it was, indeed, avowed in so many words by Senator Weeks in an address in the Senate on August 1, 1917 (Cong. Rec., vol. 56, pt. I, pp. 5644 and 434)—

> "That the advocates of national prohibition—very largely those connected with the Anti-Saloon League—are urging this matter and doing so with the argument that they are not asking any member of Congress to declare that he is in favor of national prohibition, but simply that he shall not 'become an avowed exponent and protector of the liquor traffic by refusing to vote to allow the people of the Nation, by States, through their representatives, to determine this question.' "

And even more insistent in the view that the Houses of Congress should not pass upon the necessity for the proposed amendment was Senator Shepperd, one of the leaders in the movement for constitutional prohibition. On July 30, 1917, he said (*id.*, p. 5553):

> "The member of Congress who will not vote for the submission of a constitutional

> amendment to the decision of the States, where it belongs, unless he personally believes it should become a part of the Constitution, usurps the function of the States, arrogates to himself and the Federal Government a prerogative that belongs to the States, and violates the very essence of their sovereignty. . . . Were I opposed on principle to nation-wide prohibition, I would vote to submit the amendment to the States in order that they might exercise one of their fundamental rights."

In the House, Representative Horace W. Vaughan, of Texas, said (Cong. Rec., vol. 52, part 6, p. 65, Appendix):

> "They tell us we should vote for the amendment, whether we favor it or not, to refer or submit it to the people; that the people have a right to amend the Constitution, and that we should give them a chance to do so. The same could be said of any amendment offered. The Constitution does not provide for submitting amendments to the people, but for proposing them to the legislatures of the several States or to conventions in the several States for their ratification. It is not necessary for Congress to propose in order to give the States the opportunity to amend. The Constitution is so worded that a Member of Congress in voting for a proposed amendment votes not to refer it or submit it to the people, but that he deems it necessary and proposes it for ratification. Congress is required by the plain language of the Constitution to vote its judgment upon the proposition."

Undoubtedly many Senators and Representatives concurred in the submission of the proposed constitutional amendment without deeming it necessary. In so doing they plainly were not dis-

charging the duty which the Constitution in express terms imposes upon them.

Whatever doubt there might otherwise be on this score is dispelled by the reports made by the Judiciary Committees of the Senate and the House, to whom the resolution proposing the eighteenth amendment was referred. The Senate report (65th Congress, 1st sess., report No. 52, June 11, 1917, pp. 2, 3, 5) adopted the following as the expression of the committee's views upon the subject:

> "The question considered by the committee is not one primarily touching the merits of the proposed amendment itself, but whether there is a sufficient public sentiment in favor of the submission of the amendment to the action of the people to require the passage of the joint resolution. . . .
>
> "It is proper to say that there are members of the committee who concur in the report recommending the submission of the proposed amendment to the States who do not, by such action, indicate their approval of the adoption of the amendment as a part of the Constitution nor that they would themselves advocate its ratification by the legislatures of the States; but in deference to the immense mass of petitions for this amendment of the organic law, coming from the people in all parts of the country, and believing that an opportunity should be given to them to be heard upon the merits of their cause in the forum of the States, where alone it can be heard and decided, the majority of the committee would deem a refusal to submit the proposed amendment to the States for consideration analogous to the denial of the right of a party to be heard in court upon a question of private right."

The report of the House committee (65th Congress, 2nd session, report No. 211, part I, December 14, 1917, pp. 1, 2) is equally explicit in failing to declare the proposed amendment necessary. It says:

> "Without considering the merits of the prohibition policy of dealing with the alcoholic liquor traffic . . . your committee is of the opinion, and feels that it is incumbent upon the Congress, to submit the issue to the States. . . . The question submitted by this report to the Congress is not whether the manufacture and sale, etc., of alcoholic liquors shall be prohibited but whether the matter shall be submitted to the States for their determination."

The joint resolution proposing the eighteenth amendment is to be read in the light of these reports. *Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318.

It must be obvious, therefore, that the requirement in article V to which we have adverted, constitutes a vital condition precedent to the adoption of any valid amendment to the Constitution of the United States. It is directly coupled—and in fact in the same sentence—with the other express prerequisites, namely, (1) action by two-thirds of both Houses of Congress, and (2) ratification by the legislatures of three-fourths of the States; and there can be no reasonable distinction made among the three conditions. All must be substantially complied with if a valid amendment is to result. In amending the Constitution, Con-

gress acts merely as the agent of the people, and cannot dispense with any of the conditions qualifying its own authority. For these and like reasons it has many times been held that "provisions of a constitution regulating its own amendment, otherwise than by a convention, are not merely directory, but are mandatory, and [that] a strict observance of every substantial requirement is essential to the validity of the proposed amendment" (12 Corpus Juris, pp. 688-9, and the authorities there cited). It is submitted that compliance with the terms of article V is of the essence and jurisdictional, and hence should be made to appear clearly and unambigously in the act or resolution of Congress whereby a proposition for an amendment to the Constitution of the United States is laid before the legislatures of the several States, to the end that both the legislatures and the people may know beyond question that the precautionary condition precedent which is applicable has been duly satisfied and observed and the authority of Congress not exceeded.

The legislative construction given to article V of the Constitution at the very first session of Congress in 1789, almost contemporaneously with the adoption of the Constitution itself, affords most persuasive evidence of the correctness of these views. It is, of course, well-established law that such contemporaneous legislative construction is of the utmost weight and entitled to great deference in determining the force and effect of a

constitutional provision, since it may well be presumed to have resulted from the same views as were entertained by the framers themselves. *Missouri Pac. Ry. Co.* v. *Kansas,* 248 U. S. 276, 281-2; *Ames* v. *Kansas,* 111 U. S. 449, 469; *The Genesee Chief* v. *Fitzhugh,* 12 How. 443, 458; *Ogden* v. *Saunders,* 12 Wheat. 213, 290; *Cohens* v. *Virginia,* 6 Wheat. 264, 420; 12 Corpus Juris, p. 714.

The First Congress contained many of the men who were members and leaders of the various constitutional conventions. Shortly after its organization, it proposed the first ten amendments to the Constitution. On August 22, 1789, Mr. Benson introduced a resolution in the House of Representatives which laid these proposed amendments, *inter alia,* before Congress. This resolution read in part as follows (Annals of Congress, Gales & Seaton's ed. of 1834, vol. I, 777):

> "*Resolved by the House of Representatives of the United States in Congress assembled,* That the following amendments to the Constitution of the United States having been agreed to by two-thirds of both Houses, be submitted to the Legislatures of the several States," etc.

It will be observed that this resolution merely certified, not, as the Constitution required, that two-thirds of both Houses deemed the amendments necessary, but only that the requisite number had "agreed" to it. The terms of the proposed resolution were obviously as consistent with a want of a congressional finding of necessity as with the con-

trary. The committee to whom the resolution was referred at once amended it so as to follow the plain terms of the Constitution itself, manifestly because they believed, as stated by Roger Sherman in debate less than a fortnight before, that (Benton's "Abridgment of the Debates of Congress," vol. I, p. 136)—

> "All that is granted us [*i. e.*, the Congress] by the 5th Article is, that whenever we shall think it necessary, we may propose amendments to the Constitution."

(See also Annals of Congress, Gales & Seaton's ed. of 1834, vol. I, 430). Accordingly, on Monday, August 24, 1789 (Annals of Congress, Gales & Seaton's ed. of 1834, vol. I, 780; see also 5 Hinds' Precedents, sec. 7029, p. 1011, note 2):

> "Mr. Benson, from the committee appointed for the purpose, reported an arrangement of the articles of amendment to the Constitution of the United States, as agreed to by the House on Friday last; also, a resolution prefixed to the same, which resolution was twice read and agreed to by the House as follows:
>
> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* (two-thirds of both Houses deeming it necessary,) That the following articles be proposed to the Legislatures of the several States as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes as part of said Constitution.
>
> "ORDERED, That the Clerk of this House do carry to the Senate a fair engrossed copy of

> said proposed articles of amendment, and desire their concurrence."

Thereafter the Senate concurred in this resolution and the amendments embodying the federal bill of rights (Annals of Congress, Gales & Seaton's ed. of 1834, vol. I, 88).

In discussing another, but related, aspect of this action of the First Congress in proposing the first ten amendments to the Constitution, Mr. Chief Justice White recently referred to the force and effect of the resolutions proposing those amendments to the state legislatures, and said as follows, *Missouri Pacific Ry. Co.* v. *Kansas,* 248 U. S. 276, 282:

> "When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison,* and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated."

This language applies with all its force in the case at bar. It demonstrates that a congressional resolution proposing constitutional amendments had, in the opinion of the framers of the Constitution and their enlightened contemporaries, to bear upon its face, not only evidence of mere concurrence by the requisite number of Senators and

* Madison moved the adoption of article V in its final form in the Constitutional Convention (Farrand's "Records of Federal Convention," vol. II, p. 559).

Representatives in the act of submission to the state legislatures, but, in addition, a distinct declaration and finding of necessity for the amendment by two-thirds of both Houses of Congress. Obviously, this preliminary condition, specifically prescribed in article V of the Constitution, was regarded in 1789 as a matter to be expressly and unambiguously found by Congress, and so essential and jurisdictional in character as not to be left to mere inference or implication; for it cannot be doubted that the necessity for amending the Constitution was never more firmly and completely believed by Congress than in the case of the first ten amendments and that never would its conviction of necessity have been more readily assumed or implied.

The importance and desirability of such an express finding of necessity cannot be overestimated. It would effectually prevent official evasion of responsibility in a matter of the utmost moment, and clearly bring before the members of Congress their full constitutional duty and responsibility. In the case at bar, for instance, a concurrent resolution of both Houses of Congress announcing in terms, that two-thirds of both Houses *deemed* the amendment in question *necessary*, would have probably effectually put an end to the effort to secure votes of Senators and Representatives in favor thereof upon the plea that they could properly waive their own convictions in order "to allow the people of the Nation, by

States, through their representatives, to determine this question."

State legislatures have repeatedly required subordinate bodies and officers expressly to find and certify a fundamental fact and condition precedent in order to prevent its actual suppression under the cover of the implication assumed to arise from mere action and the silence of the body or officer upon the subject. *Hoyt* v. *City of East Saginaw*, 19 Mich. 39, 44-7; *Hoffman* v. *Pittsburg*, 229 Pa. St. 36, 38-40. In the *Hoyt case, supra*, Chief Justice Cooley said (pp. 46, 47)—

> "The Legislature might suppose it possible that members of a city council could be induced to vote to direct a certain work to be done when they would hesitate to say, upon their official oaths, that the work was actually necessary if that was the specific question upon which they must record their opinion. . . .
>
> "It is evident, I think, that under the charter of East Saginaw, the declaration of the necessity for the improvement is a distinct act from and precedes the order that the improvement shall be made. It is the commencement of the proceeding, and is as indispensable to give the council jurisdiction as is process or a voluntary appearance of parties in civil actions to give jurisdiction to a court. . . . This step having never been taken, the whole proceeding is a nullity."

And in the Federal Government responsible executive officers empowered to take important specified action whenever they "deem it necessary," have usually been at pains to make it clear that they did in fact find the required necessity when

they acted under the authority conferred. Thus, a recent act of Congress authorized the President "*whenever he shall deem it necessary* for the national security or defense" to assume control of certain facilities of communication (40 Stat. 904, ch. 154), and in his proclamation of July 22, 1918, taking over the telegraph and telephone systems of the country, the President expressly found and declared that "it is deemed necessary for the national security and defense" to take the action in question. See also section 15 of the act of Congress of August 10, 1917 (40 Stat. 276, ch. 53) and the presidential proclamation of September 16, 1918, thereunder.

For the foregoing reasons it is submitted that a due regard for the terms of article V of the Constitution and the conditions which they erect and impose, requires that when the Houses of Congress propose an amendment to the Constitution, they shall first expressly find and declare that they deem it "necessary."

Applying this criterion to the resolution adopted proposing the so-called eighteenth amendment, particularly in the light of the history of the measure and the reports of the committees of Congress that framed it, it must be apparent that no finding of constitutional necessity for the amendment has been made by the Houses of Congress. The joint resolution itself reads in parts as follows (40 Stat. 1050):

> "Resolved by the Senate and House of Representatives of the United States of America

> in Congress assembled (*two-thirds of each House concurring therein*), That the following amendment to the Constitution be, and hereby is, proposed to the States," etc.

The statement that two-thirds of each house "*concurred*" is certainly not equivalent to saying that they "*deemed*" the amendment "*necessary.*" Mere concurrence in leaving the proposed amendment to the States is manifestly not determining that it is necessary. The former act may result from an entirely non-committal or even disapproving attitude upon the merits of the proposed amendment, but the latter can only flow from a firm conviction on that score; and it is solely when this conviction exists that the people have authorized the Houses of Congress to set in motion the machinery for amendment provided in article V. In order that the necessity might be duly found and guaranteed by some body under oath and high official responsibility, the people have laid upon the Houses of Congress that specific duty. To authorize these governmental agencies to evade the discharge of this solemn duty, or to facilitate such an evasion of responsibility would be in effect to rewrite the Constitution so as to confer the power to propose amendments "whenever two-thirds of both houses shall *concur,*" instead of "whenever two-thirds of both houses shall *deem it necessary.*"

The force of this reasoning is in no way impaired by such authorities as *McCray* v. *United States,* 195 U. S. 27, which forbid the courts to inquire into the motives of Congress. Indeed,

this very rule but emphasizes the propriety of forbidding the Houses of Congress to employ a form of resolution well calculated to conceal a failure, or even a refusal, to discharge an essential constitutional duty, not in respect of ordinary legislation merely, but of the amendment of the fundamental law.

It merely begs the question to assert, as does the brief of the Government in the present case, that "the proposal, by the required vote, of an amendment is a determination that the necessity exists and is, therefore, a constitutional exertion of power" (p. 25). Let us suppose that the resolution submitting an amendment expressly recited that the Houses of Congress did *not* deem the proposed amendment necessary, but, nevertheless, submitted it "by the required vote." Could there be any doubt that that proposal would be unconstitutional and void? Yet it would have the required vote! Manifestly the vote itself is not sufficient; the Constitution requires, as a condition precedent, an act of judgment and a finding of necessity based thereon. This is a jurisdictional matter. It vitally concerns the power and right of an agent of the people to do an act that finally may bind all the people. The right of a special agent to exercise such a special and limited authority should clearly appear. How otherwise can the several state legislatures be advised that the Houses of Congress have in fact acted within their authority, and have exercised the judgment and arrived at the convic-

tion prescribed by the Constitution as a condition precedent?

The state legislatures have clearly no right to ratify an amendment unless it has been properly proposed by the Houses of Congress. The manner in which they are to be advised whether the conditions precedent provided in article V of the Constitution have been duly complied with, is by the certified copy of the joint resolution of Congress transmitted to them. But the joint resolution and the records of Congress disclose upon their face that two-thirds of the Houses of Congress did no act evidencing that they deemed the proposed amendment necessary, as required by article V of the Constitution.

Cases like the *McCray* case, *supra* (195 U. S. 27), which forbid the courts to inquire into the motives of Congress, and cases like *Field* v. *Clark*, 143 U. S. 649, which suggest that a court should not investigate the accuracy of a duly authenticated act of Congress, are not in point. The question in the present case is raised without any regard whatever to the motives of Congress and upon the assumption of the entire accuracy of the public records involved. If these be deemed correct, they demonstrate the failure of the Houses of Congress constitutionally to propose the amendment. This inquiry must, of course, be open to the courts or else the mandatory provisions of the Constitution would be rendered in fact wholly futile.

It argues nothing to say that other amendments have been proposed under substantially similar

forms of joint resolution, for, as Mr. Justice Brewer said in *Fairbank* v. *United States,* 181 U. S. 283, 311:

> "When the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, *although several times repeated and never before challenged.*"

And in *Oakland Paving Co.* v. *Hilton,* 69 Cal. 479, 502, the court declared that:

> "Frequent violations of the constitution, in our judgment, instead of inducing courts to hold such violations lawful, is the strongest reason that courts should so exercise their power as to put an end to them. This is the highest duty of courts, and one from which they should not shirk, and which they cannot evade."

Thus, in *Warfield* v. *Vandiver,* 60 Atl. (Md.) 538, 541, it was held that the practical construction of the Maryland Constitution in the matter of submitting proposed amendments for executive approval or rejection, should have no weight in determining the question as to whether such approval was or was not required by the state constitution, the court saying:

> "The fact that other amendments heretofore propounded have been submitted to and have been signed by the Governor is of no weight in translating the provisions of the Constitution."

But the people of all the States have long acquiesced in the prior amendments, and prescription has thus healed their defects, if any. *Pease* v. *Peck,* 18 How. 595, 597; *Nesbit* v. *People,* 19 Colo.

441, 452; *Taylor* v. *Commonwealth*, 101 Va. 829, 831; *Weston* v. *Ryan*, 70 Neb. 211, 216-8.

The people of the United States have a right to insist that their agents in the Houses of Congress shall act only within the authority conferred upon them in article V; but, as these limitations are exclusively for the benefit and protection of the people, the people may also waive them, if they see fit to do so. If, therefore, an amendment has been unconstitutionally or defectively proposed, but not called into question upon that ground within a reasonable time, fundamental principles of law and sound public policy alike demand that such acquiescence be deemed the adoptive act of the people themselves, and that the existence of the amendment be thus placed beyond the reach of attack or judicial inquiry.

The origin of the insufficient form of resolution employed in the case of the so-called eighteenth amendment and in other instances, is apparently a mistake in recording or engrossing the form of resolution by which the Houses of Congress actually passed upon the first ten amendments. The engrossed copy on file in the State Department differs from the resolution as set forth in the Annals of Congress above referred to. As has already been pointed out above, that resolution was deliberately altered so as to conform to the language and requirements of article V in every particular; but in some inexplicable manner it was engrossed in the form in which it now ap-

pears in the first volume of the Statutes at Large of the United States, published by Messrs. Little and Brown in 1845 (eleven years after Gales and Seaton had published the carefully compiled "Annals of Congress" above referred to), namely (p. 97):

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, *two-thirds of both Houses concurring*, That the following articles be proposed to the legislatures of the several states, as amendments to the constitution of the United States," etc.

In this way the loose and unconstitutional practice discussed above came into being, and has operated, certainly in the case of the so-called eighteenth amendment, to defeat a plain constitutional guaranty. The court is now urged to correct and put a stop to an objectionable and unconstitutional legislative practice, clearly subversive of the letter and intent of the Constitution.

IV.

THE SO-CALLED EIGHTEENTH AMENDMENT HAS NOT BEEN RATIFIED BY THREE-FOURTHS OF THE SEVERAL STATES.

Article V of the Constitution provides that proposed amendments thereto "shall be valid to all intents and purposes . . . when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress."

Congress directed that the so-called eighteenth amendment proposed by it should be ratified by the action of the legislatures of the States, not only providing to that effect in the proposing resolution, but expressly declaring in section 3 of the so-called amendment itself that it should be inoperative unless "ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution," within seven years. We are not, therefore, concerned with any question of ratification by conventions in the States, but solely with the validity of the alleged ratification of the proposed amendment by the legislatures of the several States.

Three States—Rhode Island, New Jersey and Connecticut—have not even attempted to ratify the amendment. In the remaining States the legislative assemblies, called by various names, have given their approval to the amendment. In nineteen of these States, however, the people in their respective state constitutions* have reserved to

* The following are references to the apposite constitutional provisions in those States: South Dakota, art. III, sec. I (p. 1256); Oregon, art. IV, secs. I and Ia (p. 1154); Nevada, art. XIX, secs. 1, 2 and 3 (p. 899); Montana, art. V, sec. I (p. 819); Oklahoma, art. V, secs. 1-8 (p. 1097); Maine, art. XXXI, secs. 1, 16-20 (p. 607); Missouri, art. IV, sec. 57 (p. 785); Michigan, art. V, sec. 1 (p. 688); Arkansas, art. V, sec. 1 (p. 93); Colorado, art. V, sec. 1 (p. 195); Arizona, art. IV, sec. 1 (p. 58); California, art. IV, sec. 1 (p. 123); Ohio, art. II, secs. 1-1g (p. 1060); Nebraska, art. III, secs. 1-1d (p. 850); Washington, art. II, sec. 1, (p. 1443); North Dakota, art. II, sec. 25 (p. 1022); Mississippi, art. IV, sec. 33 (Hemingway's Annotated Code, 1917, p. 151); Utah, art. VI, sec. 1 (p. 1355); Massachusetts, art. XLVIII, subd. I, of amendments.

The constitutions of Maryland (art. XVI, p. 652) and New Mexico (art. IV, sec. 1, p. 939) provide only for the referendum and not for the initiative. The argument under this point, however, applies to those States as well as to the others mentioned.

The foregoing page references are to Kettleborough on "State Constitutions," unless otherwise indicated.

themselves the right to enact practically every kind of legislation (with some minor exceptions) upon their own initiative, and also an equally comprehensive right to require the reference to themselves of almost all the enactments of their several legislative assemblies for rejection or approval at the polls. That is to say, in each of these States the initiative and referendum have left the electors of the State in effectual possession of continuous and permanent law-making power, not merely equal, but superior, to that of the houses of the legislative assemblies themselves. It is plain, therefore, that in the jurisdictions where the initiative and referendum prevail —and, indeed, even in the jurisdictions where the referendum alone obtains—the electors of the State are in truth and effect a branch of the legislative power, endowed with at least as much authority as the official legislative assembly itself, and yet in none of these States has there been any attempt to submit the eighteenth amendment to the electors of the State, except in Ohio, where the proposed amendment has been rejected at the polls.

A typical illustration of the manner in which the legislative power of the State is apportioned in the jurisdictions above referred to is contained in the following extract from section 1 of article V of the Constitution of Michigan:

> "The legislative power of the State of Michigan is vested in a senate and house of representatives; but the people reserve to

themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds. . . .

"The second power reserved to the people is the referendum. No act passed by the legislature shall go into effect until ninety days after the final adjournment of the session of the legislature which passed such act, except such acts making appropriations and such acts immediately necessary for the preservation of the public peace, health or safety, as have been given immediate effect by action of the legislature.

"Upon presentation to the secretary of state within ninety days after the final adjournment of the legislature, of a petition certified to as herein provided, as having been signed by qualified electors equal in number to five per cent. of the total vote cast for all candidates for governor at the last election at which a governor was elected, asking that any act, section or part of any act of the legislature, be submitted to the electors for approval or rejection, the secretary of state, after canvassing such petition as above required, and [if] the same is found to be signed by the requisite number of electors, shall submit to the electors for approval or rejection such act or section or part of any act at the next succeeding general election; and no such act shall go into effect until and unless approved by a majority of the qualified electors voting thereon.

"Any act submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect ten days after the date of the official declaration of the vote

> by the secretary of state. No act initiated or adopted by the people shall be subject to the veto power of the governor."

In States having constitutional provisions substantially as above, the legislative power conferred upon and posessed by the nominal state legislature is hardly more than tentative in character, and the electors of the State are in fact the legislature, or the only department thereof possessed of supreme and ultimate power. With inconsequential exceptions, no permanent legislation can have any force and effect in those States unless the electors thereof are willing to accept it or acquiesce in it, and practically nothing that has their approval can be kept off the statute books, if they see fit to call into play their initiative power.

There can be no doubt of the constitutionality of such a distribution of legislative power within a State. The Constitution does not prescribe any requirement for the internal structure of a state government other than that it shall be republican in form; and, under our system of government, the right to decide what is or is not a republican form of government is exclusively vested in the political branches of the National Government. *Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 234. Since Representatives and Senators from all the States in question have been duly received and seated in Congress and now constitute a part of it, it is patent that the legislative department of the National

Government views those States as possessing republican forms of government; and since the executive department of the National Government is every day having dealings with them as duly constituted States, it must be equally apparent that that department of the Federal Government regards them as organized and functioning in accordance with the requirements of the Federal Constitution.

So long as a republican form of government is maintained, it is obvious that it is immaterial to the Federal Government how the State arranges or distributes the machinery for its own local government. The right of a State to have whatever means or instrumentalities of local government it deems fit is, indeed, as clear as its right to enact measures of local self-government in accordance with its own peculiar wishes. Both of these powers are wholly reserved to the States in the tenth amendment. *State ex rel. Davis* v. *Hildebrant*, 94 Oh. St. 154, 161-2, affirmed, 241 U. S. 565. It is entirely competent—and it always has been—for a State to establish the commission form of government for itself and to vest in such commission all or any of the powers of government, or to provide for a legislature with one, two, three, or even more, houses or branches. It is the right of the people of a State to abolish the legislative assembly entirely and to enact all laws upon their own initiative; or to create a legislative assembly and require that the measures enacted by their representatives or agents shall only be tentative-

ly laws and subject to final approval or rejection by the electorate at the polls. In such a case the electorate of the State is a part of the legislative power and of the legislature of the State in the truest sense, since it and it alone has general, supreme and ultimate legislative power. In such a jurisdiction it would be impossible for the legislative assembly to enact a prohibition statute or to repeal one, if the electorate were opposed. The latter alone could say finally and conclusively whether such a condition should prevail in their State as the law.

These considerations make it imperative to determine whether in referendum and initiative States the legislative assemblies can do an act which necessarily must fundamentally and permanently affect and alter the law and public policy prevailing therein, without any recourse to or respect for the will of the respective electorates. That an amendment to the Federal Constitution affects the law prevailing within the States, is too plain to warrant discussion. Article VI of the Constitution itself declares that the Constitution "shall be the supreme law of the land," and that "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding," and, in the case of such an amendment as the eighteenth amendment, which is in and of itself mere sumptuary legislation directly aimed at the regulation of the conduct of life by every individual in the country, that aspect of the matter is pe-

culiarly clear. We are, thus, necessarily led to the inquiry, What is the meaning of the term "legislatures" in article V of the Constitution, which requires a proposed constitutional amendment to be "ratified by the *legislatures* of three-fourths of the several States"?

Of course, the Constitution, being a written instrument, its meaning does not alter, and the word "legislatures" used therein must now bear the same interpretation that would have been placed thereon by the framers. *Dred Scott* v. *Sandford,* 19 How. 393, 426; *South Carolina* v. *United States,* 199 U. S. 437, 448. As, however, the Constitution was not made for a day but was intended to embrace within its provisions the entire duration of our national existence, however long that might be (*Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326; *McCulloch* v. *Maryland,* 4 Wheat. 316, 415; *Cohens* v. *Virginia,* 6 Wheat. 264, 387), it is manifest that, "as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred" therein (*South Carolina* v. *United States,* 199 U. S. 437, 448), and that it would certainly not be permissible "to read into the [Constitution] a *nolumus mutare* as against the law-making power" of a State. *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110. Yet it is all but inevitable that such a consequence of rigid inadaptability to new conditions should follow, if it be true that the legislatures which lawfully may

act upon proposed constitutional amendments are only the bicameral legislative assemblies of the States, as the defendants claim. For it is manifest that a State, which had deemed it proper to abolish its legislative assembly in its own interest, would then be wholly incapacitated from either adopting or rejecting a proposed constitutional amendment, which Congress, in its discretion under article V, had seen fit to direct should be ratified by the legislatures, and not by conventions in the several States. An outcome which would leave it within the uncontrollable power of Congress to prevent any State possessed of a lawful and constitutional form of government, from having a voice in the decision of what shall be the supreme law of the land, is certainly to be deprecated and avoided, if possible. That it is possible to avoid any such conclusion is self-evident; since it is only necessary to construe the word "legislatures" in article V, as not limited exclusively to the formal legislative assemblies of the several States, but as intended to refer to the repository of legislative power therein, whatever that may be and however called, and all the parts thereof.

Such a construction of the Constitution but carries out its primary intention and is not inconsistent with what the framers may be deemed to have had in contemplation. The word "legislature" could not have signified a bicameral body to them. They must have known that a legis-

lative assembly of but one house existed, or had shortly before existed, in Rhode Island, Connecticut and Pennsylvania.* In fact, the New Jersey plan for a federal constitution provided, according to Madison, for but a single legislative body (Larned, vol. V, pp. 3297-8). The framers certainly looked upon the people of the States as the source of all governmental power in the several States and upon the legislative assemblies as merely their creatures or agents. *Cohens* v. *Virginia*, 6 Wheat. 264, 389. Indeed, most of the state constitutions of that day were explicit upon that score.† The founders of our government could, therefore, have seen no legal impropriety or deterrent in a State creating for itself

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*Connecticut did not adopt a constitution until 1818, when for the first time its legislative department became bicameral. At the time of the formulation of the Federal Constitution, it was operating under a charter granted in 1662 by Charles II, which it had converted into a constitution by an act of its assembly in October, 1776 (Johnston's "Connecticut," ch. 16; Thorpe, vol. I, p. 531). Rhode Island did not adopt a constitution until 1842. In 1787 the legislative power was in a single house (Charter of Rhode Island and Providence Plantation, 1663; Thorpe, vol. VI, pp. 3211, 3215). The constitution of Pennsylvania was adopted in September, 1776, and section 2 of its "plan or frame of government" provided for but a single legislative body (Thorpe, vol. V, pp. 3082-4).

†See, e. g., Bill of Rights adopted by members of the Virginia House of Burgesses in 1776, sec. 2; Constitution of Massachusetts, adopted 1780, arts. IV and V (Thorpe, vol. III, p. 1890); Constitution of New Hampshire, effective 1784, arts. VII and VIII (Thorpe, vol. IV, p. 2454); Constitution of New York adopted 1777, art. I (Thorpe, vol. V, p. 2628); Constitution of Pennsylvania, adopted 1776, arts. IV and XIV (Thorpe, vol. V, pp. 3082-4); Constitution of Maryland, adopted 1776, arts. I, IV and V of "declaration of rights" (Thorpe, vol. III, pp. 1686-7); Constitution of North Carolina, adopted 1776, arts. I, II and XVIII of "declaration of rights" (Thorpe, vol. V, pp. 2787-8); Constitution of Georgia, adopted 1777, art. I (Thorpe, vol. II, p. 778). See also *Ware* v. *Hylton*, 3 Dall. 199, 223.

a legislature of three houses,* with the electorate constituting practically the third house. While, of course, it is improbable that they conceived of the fully developed machinery of the initiative and referendum, as we have them to-day, it is, nevertheless, true that the genesis of both of these legislative processes appears in the early history of our country. In several instances the royal charters granted to the colonies provided that a legislative body in the colonies should be empowered to make laws, but that such laws should be subject to be annulled by the source of the charter powers.† Here is clearly the precursor of the referendum. And in some of the early state constitutions the right of the people to assemble and consult together and to instruct their representatives, was distinctly asserted.‡ Plainly these provisions foreshadowed the latter day initiative.

* Was not the council of revision provided for in the New York Constitution of 1777 (art. III, Thorpe, vol. V, p. 2628) in effect the germ of a third house of the state legislature?

† Article IV of the Ordinances of Virginia (1621) provided in part: "That no law or ordinance, made in the said General Assembly, shall be or continue in force or validity, unless the same shall be solemnly ratified and confirmed, in a General Quarter Court of said Company here in England and so ratified, be returned to them under our seal." The charter to the Massachusetts Colony granted by William and Mary in 1691 provided in part that: "In case we, our heirs or successors, shall not within the term of three years after the presenting of such orders, laws, statutes or ordinances [enacted by the colonial legislature] signify our or their disallowance of the same, then the said orders, laws, statutes or ordinances shall be and continue in full force and effect." (Thorpe, vol. III, p. 1883). [The capitalization, spelling and punctuation of the foregoing have been modernized herein.]

‡ The Constitution of Pennsylvania (1776), art. XIV, provided "that the people have a right to assemble together to consult for their common good, to instruct their representatives," etc. (Thorpe, vol. V, pp. 3082-4). The Constitution of Maryland (1776), art. V, provided "that the right of the people to par-

The founders indisputably realized that the people in the several States had the right and the power to circumscribe the functions of their respective state legislatures so as to subject any action of the legislatures to popular vote, and that consequence naturally followed from the conviction, which all of them must have had, that the people of the States were the exclusive source of governmental power in their respective States. *Chisholm* v. *Georgia,* 2 Dall. 419, 471; *Van Horne's Lessee* v. *Dorrance,* 2 Dall. 304, 308. The New England town-meeting system of government prevailed when the Constitution was adopted, was familiar to virtually every enlightened citizen of the time, and was a perfect illustration of local government conducted under and by direct legislation. *People ex rel. Metropolitan St. Ry. Co.* v. *Tax Com'rs.,* 174 N. Y. 417, 432; *In re Pfahler,* 150 Cal. 71. The makers of the Constitution may perhaps not have been able to envisage in full detail the highly complicated initiative and referendum systems of to-day; but, in the light of what then prevailed, no one can reasonably assert that, if those systems had been laid before them, they would have declared them at variance with any of the fundamental conceptions of the republican

ticipate in the Legislature is the best security of liberty, and the foundation of all free government." (Thorpe, vol. III, pp. 1686-7.) The Constitution of North Carolina (1776), art. XVIII of the "declaration of rights", is the same as the Pennsylvania provision quoted above (Thorpe, vol. V, pp. 2787-8). In August, 1789, the House of Representatives of the first Congress debated the advisability of adding a clause similar to the one in the Pennsylvania constitution to the Constitution of the United States. (Annals of Congress, Gales & Seaton's ed., 733-747.) The proposition to this effect was, however, defeated.

or constitutional system they were creating. The framers had beheld legislatures with but a single house, as in Connecticut, and the prospect of beholding legislatures of three bodies—the third and supreme house of which would be the electorate itself—cannot reasonably be declared to have been beyond their ken.

The Federal Constitution did not define the nature, composition, authority, or function of the "legislatures" of the States upon whom power was conferred in article V. The Constitution left the state legislatures precisely where it found them—exclusively under the control of the people of the respective States. When, therefore, the framers used the term "legislatures" in article V, they were employing it in its broadest sense to denote the legislative instrumentalities by which the legislative power of a State might be expressed in the several States at any time during the future life of the Nation. The all-pervading purpose was to have the people of the State express their will as to changing the fundamental law of the Nation. It is *their* will that was intended to govern, and they are to express that will through the legislative department of the respective state governments which they have established. But how that department should be constituted, how it should act, when it should act, what conditions should be imposed before its action became effective—all these matters were left by the Constitution to the States to settle according to their pleasure.

There is a body of discriminating and carefully considered authority which supports these views. *State ex rel. Schrader* v. *Polley*, 26 S. Dak. 5; *State ex rel. Davis* v. *Hildebrant*, 94 Oh. St. 154, affirmed, 241 U. S. 565; *State ex rel. Mullen* v. *Howell*, 181 Pac. 920 (Supreme Court of Washington); *State ex rel. Hopkins* v. *Amsbury*, Dist. Court, Lancaster County, Neb., Morning, J., August 18, 1919; *Hawke* v. *Smith*, Supreme Court of Ohio, September 30, 1919, affirming Court of Common Pleas, Franklin County, Dillon, J., June 19, 1919; *Carson* v. *Sullivan*, Circuit Court, Cole County, Mo., Slate, J., no opinion; article by Everett P. Wheeler, Central Law Journal, May 19, 1919; Law Notes, July, 1919, p. 62. It would unduly extend the discussion to set forth here adequate extracts from the foregoing authorities; but the pertinent passages of some of them have been printed in an appendix to this brief. The opinions quoted from are exhaustive, well-reasoned and learned to an exceptional degree.

It may be urged that the correct construction of the referendum provisions in the States renders them inapplicable to a proposed amendment to the Federal Constitution. Even if that were true—and there is strong authority to the contrary (see, *e. g.*, the cases referred to above)—it is beside the point. The primary question is not whether the state referendum provisions embrace federal constitutional amendments within their terms, but whether those provisions (either with or without the initiative pro-

visions in the particular State) render the electorate such a part of the legislative body of the State as to constitute them in effect a third house of the "legislature" of the State within the meaning of article V of the Constitution, and thus make their assent necessary to due and legal ratification by the State of a proposed amendment to the National Constitution. If the referendum provisions of a given State embrace proposed federal constitutional amendments, that means that in the State in question there now exists adequate machinery for submitting the matter to the electorate. If, however, such referendum provisions do not in terms apply to proposed federal constitutional amendments, that merely indicates a present want of due instrumentalities for procuring an expression of the will of the people on the question in hand, and renders it incumbent upon the State to enact such measures as may be requisite toward that end. Inasmuch as section 3 of the proposed amendment allows seven years for ratification by the several States, it is apparent that there is plenty of time for the creation of an orderly procedure in every referendum State for the purpose of enabling the respective electorates thereof to pronounce their judgment on the proposed federal constitutional amendment in suit.

Such cases as *Herbring* v. *Brown*, 190 Pac. 328 (Ore.), are not in conflict with these contentions. It was held in the *Herbring* case that the

existing provisions of the Oregon referendum laws were not applicable to a proposed amendment to the Federal Constitution. It was not held, however, that under the initiative and referendum provisions in force in that State the electorate was not the repository of at least as much legislative power as its legislative assembly; in other words, it was not denied that in truth and effect the electorate of Oregon was an essential part of the "legislature" of the State within the intent and meaning of that term in article V of the Constitution. No one can reasonably doubt that under the Oregon constitution the electorate of the State retains virtually all the legislative power in its own hands. The question herein is whether under such circumstances the electorate of the State is not a part of the "legislature" whose ratification article V of the Constitution requires. If it is, its assent must be procured. It may be true, as the Oregon court has held, that the present machinery in the State is not adapted to that purpose. But that merely renders it the duty of the legislature in Oregon to erect adequate statutory processes for the purpose, unless it wishes to remain disabled from acting upon proposed amendments to the Federal Constitution.

The primary question, therefore, under this head is what constitutes a "legislature" within the meaning of article V of the Federal Constitution. It has been asserted that it consists solely of the legislative assembly of the State and that no State can limit the authority of any such rep-

resentative body. But it is submitted that in those States where the initiative or the referendum or both are in general use, the "legislature" of the State embraces the electorate as well, since the electorate is indisputably vested with a substantial part of the legislative power of those States. Upon this contention the Oregon case above cited did not pass. Neither has any other authority held to the contrary of our views, except the advisory opinion of the justices in Maine.

It would surely be illogical to argue as was done in the District Court for the District of New Jersey, that amending the Federal Constitution is not legislating in any sense. The cases ordinarily cited for this proposition hold no such doctrine. All that is intended to be declared in those cases is that "the general assembly, in amending the constitution, does not act in the exercise of its *ordinary* legislative authority." *State* v. *Cox*, 8 Ark. 436, 443. Amending the Federal Constitution is certainly not *ordinary* legislation, and, consequently, it does not require many things generally required of the usual legislation, as, for example, the assent or veto of the Executive. But inasmuch as the process goes to the creation of the fundamental law in each State, it is necessarily lawmaking. Precisely because it is a legislative activity—although not *ordinary* legislation—it has been entrusted exclusively to those branches of the federal and state governments whose function it is to formulate the laws. The whole matter has been lucidly discussed in *Hawke* v. *Smith*, decided

in the Supreme Court of Ohio on September 30, 1919, as yet unreported, as follows:

> "The functions conferred in different parts of the Federal Constitution upon the legislatures of the States are manifestly dual in their nature. For example, in the election of United States Senators by the legislatures of the several States, as provided by the Federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative and in States in which the governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the State in a manner similar to that in which the electoral college represents it in the choice of President. On the other hand, the power conferred upon the legislatures in section 4 of article I of the Federal Constitution, which confers power on the legislature of each State to prescribe the 'times, places and manner of holding elections for Senators and Representatives,' is purely legislative, and as already pointed out, in the exercise of that power all the legislative machinery of the State was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under article V, the State participates in an act which amends the Federal Constitution and in that sense performs a federal function. But it does not follow that by the word 'legislature' in that section a *corpus designatus* is meant. It participates in the making of the fundamental law and its act is legislative in character. The making of the constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification, the makers of the Federal Constitution contemplated that all of the agencies provided by the State for legislation should be

> empowered to act in accordance with the provisions made by the State at the time the action on the ratification should be taken; and that the word 'legislature' in article V is used in that sense." *

It has been suggested that this decision is distinguishable because the Ohio constitution expressly provides for referring proposed amendments to the Federal Constitution to the electorate. But no such distinction exists. If the "legislature" which may ratify a proposed amendment is the legislative assembly alone, if only that body is intended by the word "legislature" as used in article V of the Constitution of the United States, then manifestly no action by the State or the Congress can change the force and effect of the Constitution of the United States. It is only because the word "legislature" in article V signifies, not solely the legislative assembly of a State, but the repository of legislative power therein, that the provision in the Ohio constitution can have any force and effect whatever.

The impropriety of permitting the legislative assembly of a State, in which the initiative or referendum prevails, to act upon a proposed amendment to the Federal Constitution to the exclusion of the electorate of the State, is emphasized in the case of such a State as Missouri. By section 3 of article II of its constitution it is expressly provided as follows:

* The suggestion of the Ohio Supreme Court that the word "legislature" in article V of the Constitution may not have the same meaning as the same word in a different context in other portions of the Constitution, is clearly correct. See, *e. g.*, *Texas* v. *White*, 7 Wall. 700, 721.

> "As the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to co-exist with it, *the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State.*"

A clearer prohibition against ratification by the legislative assembly of any such amendment as the eighteenth amendment to the Federal Constitution, it would be difficult to express. Nevertheless, the legislature of Missouri saw fit to give its assent thereto although it could, of course, not have been unaware of the fact that the "change of the Constitution of the United States," which the proposed amendment intended, would clearly "impair the right of local self-government belonging to the people of the State." See *State ex rel. Mullen* v. *Howell*, 181 Pac. 920, 922 (Wash.), quoted in the appendix, where the nature of the amendment is discussed.

In another State, where, however, the referendum and initiative do not obtain, the plain will of the people, as expressed in the fundamental law, was likewise flouted by the legislative assembly. Section 19 of article XVI of the Florida constitution provides that—

> "No convention or legislature of this State shall act upon any amendment of the Constitution of the United States proposed by congress to the several States, unless such convention or legislature shall have been elected after such amendment is submitted."

But the Florida legislature, although only in part elected after the so-called eighteenth amendment was proposed by Congress in December, 1917 (see Florida constitution, art. III, secs. 2 and 3, and art. VII, sec. 2), nevertheless undertook to ratify the amendment on December 14, 1918, in clear violation and defiance of the constitution of the State.

It follows from these premises that in twenty-two States of the Union (exclusive of the three which have not ratified the amendment) there has been only an apparent, but not in fact a valid, ratification of the so-called eighteenth amendment, and that, consequently, it cannot yet be deemed to be a part of the Constitution of the United States and enforcible as such by the Congress and the several States.

V.

AS TO THE PROVISION OF THE ALLEGED EIGHTEENTH AMENDMENT VESTING CONCURRENT POWER IN THE CONGRESS AND THE SEVERAL STATES.

Section 2 of the alleged eighteenth amendment purports to vest concurrent power in the Congress and the several States to enforce the prohibitions of section 1, as follows:

> "Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This form of provision is entirely new in our constitutional system. No such provision is contained in the Constitution of the United States as

originally adopted, nor in any of its amendments. Hence, the court is now called upon to construe and determine the effect of a novel provision.

It would ordinarily be regarded as quite clear that if two bodies were vested with "concurrent power" to enforce any particular constitutional or legislative provision, such two bodies would *ex necessitate* have to concur in exercising the power; in other words, that there would have to be concurrence on the part of each. *Nielsen* v. *Oregon*, 212 U. S. 315, 321; *Wedding* v. *Meyler*, 192 U. S. 573, 584-5; *Ex parte Desjeiro*, 152 Fed. 1004, 1007; *In re Mattson*, 69 Fed. 535, 542; *President, etc.*, v. *Trenton City Bridge Co.*, 13 N. J. Eq. 46. It has been urged, however, that under the eighteenth amendment there need not be any concurrence at all, nor any action by a State; that if a State should venture to legislate under this grant of "concurrent power," its enactments must accord with the legislation of Congress, and, if there be any conflict, that then the legislation of Congress must prevail and overrule the legislation of the State.

It is submitted that this construction can only be upheld by wholly disregarding the word "concurrent" embodied in section 2 of the eighteenth amendment, thereby making it read:

> "The Congress and the several States shall have . . . power to enforce this article by appropriate legislation."

When the Judiciary Committee of the House of Representatives reported the Volstead Bill,

which subsequently became the act of Congress of October 28, 1919, the minority of the committee filed an able report, in which it was, among other things, stated as follows (66th Cong., 1st Session, Rep. 91, part 2, June 30, 1919, p. 5):

> "We cannot eliminate from the Constitution that concurrent power to enforce its provisions which was given to both Congress and the several States. No law would be passed in pursuance of the Constitution which failed to observe this limitation. . . . Joint or concurrent legislation is necessary for the enactment of proper enforcement legislation."

The genesis and history of section 2 of the amendment are illuminating and convincing.

Early in the Sixty-fourth Congress a proposed joint resolution (No. 55) was introduced in the Senate by Senator Sheppard proposing a prohibition amendment which, as to section 2, read as follows:

> "The Congress *or* the States shall have power independently or concurrently to enforce this article by all needful legislation."

And Mr. Webb introduced a joint resolution (No. 84) in the House of Representatives, reading in part as follows:

> "The Congress *and* the States shall have power independently or concurrently to enforce this article by all needful legislation."

In the Sixty-fifth Congress Senator Sheppard introduced a joint resolution (No. 17) providing as follows:

> "The Congress shall have power to enforce this article by appropriate legislation, *and nothing in this article shall deprive the sev-*

eral States of their power to enact and enforce laws prohibiting traffic in intoxicating liquors."

This was amended so as to omit the italicized clause, and, as so amended, was passed by the Senate on August 1, 1917. The proposed joint resolution was thereupon sent to the House and referred to the Judiciary Committee, which amended it and reported it out of committee on December 14, and it was then passed in its present form on December 17, 1917, and immediately concurred in by the Senate, viz.:

"Sec. 2. The Congress *and* the several States shall have *concurrent power* to enforce this article by appropriate legislation."

It is submitted that the word "concurrent," so employed, can be given no effect without requiring concurrence on the part of the State in any legislation of the Congress interfering with and seeking to regulate local or intrastate commerce, and, *vice versa,* concurrence by Congress in state legislation interfering with or seeking to regulate interstate or foreign commerce. Congress and the several ratifying state legislatures must have attached some definite and specific meaning and effect to the word "concurrent." It would certainly be unreasonable to assume that it was contemplated that no action could be taken by Congress, even as to interstate or foreign commerce, without securing the concurrence of the forty-eight States, and that no action affecting solely the internal affairs of a particular State could be taken

without likewise securing the concurrence of Congress and the other forty-seven States.

But having in mind the nature of our federal system and the practical problems to be dealt with, it is not at all unreasonable to conclude that the existing exclusive and independent power of Congress to regulate interstate and foreign commerce was not intended to be affected by section 2 of the eighteenth amendment; and, similarly, that the existing exclusive and independent power of the States in respect of either intrastate commerce or local self-government was not to be impaired.

So far as due enforcement by Congress of the prohibitions of section 1 of the eighteenth amendment was concerned, the independent, expressly granted power to regulate foreign and interstate commerce was ample and comprehended "all laws which shall be necessary and proper." (Const., art. I, sec. 8.) So far as the due enforcement of such prohibitions in intrastate commerce were concerned, the independent and expressly reserved powers of the States were ample and likewise comprehended all necessary and proper laws (Amendment X). However, concurrence in enforcing certain aspects of the prohibitions of the eighteenth amendment was desirable, if not necessary, on the one hand, when Congress should desire to regulate intrastate commerce and thus interfere with local self-government, and, on the other hand, when a State should desire to regulate interstate or foreign commerce and thus interfere with the province of Congress. It is highly improbable

that anyone conceived that Congress was being vested with full and unlimited power of enforcement in respect of intrastate traffic, or, conversely, that the States were being vested with full and unlimited power of enforcement in respect of interstate or foreign traffic. Far more reasonable, and in consonance with all probabilities, is it to conclude that it was contemplated that the grant of "concurrent power" would supplement the several existing powers and require concurrence in its exercise whenever either the Congress or a State should seek to interfere with the otherwise exclusive power of the other.

In the *Civil Rights Cases*, 109 U. S. 3, 19, this court, whilst denying the power of Congress to legislate under the thirteenth and fourteenth amendments for the government of the internal affairs of the States, pointed out that in the sphere of federal power outside of the States a different question would be presented, saying:

> "We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress, in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one

> State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view."

In analyzing this question of constitutional construction, it may elucidate the problem if we review the practical situation as it existed in 1917.

Congress then had unlimited and exclusive power to regulate interstate and foreign commerce in intoxicating liquors, and by means of the so-called Webb-Kenyon Act (Act of Congress of March 1, 1913, c. 90, 37 Stat. 699; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311) and the so-called Reed Amendment (Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069; *United States* v. *Hill*, 248 U. S. 420), it had effectively protected the States from further abuse of the federal privilege of carrying on interstate and foreign commerce in intoxicating liquors. The several States, on the other hand, had full power to regulate and prohibit all traffic in local or intrastate commerce in intoxicating liquors. *In re Rahrer*, 140 U. S. 545, 554, 556, *et seq.*; *South Carolina* v. *United States*, 199 U. S. 437, 453.

It was thereupon determined to regulate the subject of the traffic in intoxicating liquors by a constitutional amendment, not vesting governmental power of regulation over the subject, but legislating by way of self-executing prohibition, and merely providing for the enforcement of this absolute prohibition by the grant of "concurrent power" to the Congress and the several States—

a provision unique and anomalous in our federal constitutional system.

Was it thereby intended to vest power in the several States to regulate interstate or foreign commerce without the concurrence of Congress? Or was it intended to vest power in the Congress to regulate local or intrastate commerce without the concurrence of the several States? If not, then what was the understanding and intention of the Congress when it proposed the amendment? And, what is of more and controlling importance, what did the several state legislatures understand and intend when they ratified the proposed amendment?

In the thirteenth article of amendment to the Constitution of the United States the enforcement clause read simply that—

> "Congress shall have power to enforce this article by appropriate legislation,"

and practically the same form of expression was employed in the fourteenth and fifteenth amendments. In the eighteenth amendment, however, a materially different form of expression was devised and employed, and it is, of course, reasonable and proper to presume that something different in effect was intended. *Slaughter House cases*, 16 Wall. 36, 74.

Certainly the state legislatures which ratified the amendment must have regarded its second section as different from the corresponding provisions of the earlier amendments, and it is submitted that they must have looked upon it as granting to

them some substantial powers in exchange for the large part of their respective police powers and exclusive control of local self-government which they were about to surrender. It is very doubtful whether the amendment would have so readily, or at all, found approval by the legislatures of forty odd States, if they had understood that the manner in which the prohibitions of the amendment were to be enforced against their own people, was in no substantial respect to rest with them. They could not but have realized that the amendment was in effect radical and far-reaching sumptuary legislation, whose prohibitions would be received by the people in the various States with quite different views and emotions, dependent upon the nature of the local sentiment, and that, therefore, its due administration and enforcement would in large measure have to be entrusted to the States and made to depend for effectiveness upon the influence which the respective legislatures would exert upon the people of their own States. This country is so vast, its population so varied in character, the differences in climate, physical characteristics, predominant industries and habits of living and thinking, so great, that there are necessarily wide differences of opinion and feeling among the American people as to the conduct of life; and a legislature would have been, indeed, unfitted for its duties if it had not realized, what all American history and experience demonstrate, that to subject any

section of the country in the regulation of the personal habits of its inhabitants to the absolute control of an outside authority, even a federal authority, would soon create in their minds grave dissatisfaction and a deep-seated conviction of intolerable tyranny.

In this provision for "concurrent power" of enforcement, however, the various legislatures must have perceived the means of avoiding any such source of conflict and public dissatisfaction. If the several States were to have "concurrent power to enforce" the prohibitions of the amendment, then manifestly each State would be authorized to concur only in what met its needs and its own peculiar circumstances. In one State the local situation might require the most drastic measures; in another, the prohibitions could be made effectual with much less legislative effort. Since the great and primary purpose of the eighteenth amendment, as disclosed in its plain terms, was the prohibition of intoxicants, it could hardly be a matter of national concern how that end might be accomplished in any given locality, so long as it was effectually brought about.

The word "concurrent" is usually defined as "having the same authority; acting in conjunction; agreeing in the same act," etc. (Black's Law Dictionary; Century Dictionary), and that definition has received the approval of the courts of the United States in a number of cases cited *supra,* which involved the concurrent powers of

sovereignties. *In re Mattson*, 69 Fed. 535, 542; *Ex parte Desjeiro*, 152 Fed. 1004, 1007; *Nielsen* v. *Oregon*, 212 U. S. 315, 321; *Wedding* v. *Meyler*, 192 U. S. 573, 584-5; *President, etc.*, v. *Trenton City Bridge Co.*, 13 N. J. Eq. 46.

The case of *In re Mattson, supra*, involved the consideration of the force and effect of the grant of "concurrent jurisdiction" over the Columbia River to the States of Oregon and Washington. Oregon had enacted a statute decreeing a restriction upon the right to fish in that river, but the State of Washington had not passed the same or similar legislation, that is, had not concurred therein. In holding the Oregon act ineffective, the court, after carefully examining the subject, said:

> "In the case under consideration, Oregon has established a weekly close season for the Columbia river, and has made fishing in the river during such season a crime; and it undertakes to punish a citizen of Washington for fishing in violation of this restriction in that part of the river within his own state, although by the laws of such state he is permitted to fish on the day interdicted by Oregon. It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right, but the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state, more than Washington, determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days

> for such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of a concurrent jurisdiction? The word 'concurrent,' in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

And in *Ex parte Desjeiro, supra,* the same reasoning and rule were followed, the court declaring:

> "It is the act of concurrence between the two states, in the exercise of legislative authority, that validates the act and gives it the force of law, and, unless there is a concurrence or assent by both states to the enactment, it cannot have that force. This is the doctrine of the *Mattson Case*, and it has direct application to the case at bar."

In *Wedding* v. *Meyler,* 192 U. S. 573, 584-5, the court adopted the following statement of Chief Justice Robertson in *Arnold* v. *Shields,* 5 Dana (Ky.) 18, 22, in which he passed upon a grant of concurrent jurisdiction over the Ohio River to the States of Indiana and Kentucky:

> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive—as that possessed by Kentucky, over so much of the Ohio River as flows between them."

It is entirely proper to presume that Congress and the state legislatures had the above authorities in mind when they acted upon the amendment in question. Had it been intended to provide, not for action in conjunction, but for separate and independent action on the part of the Nation and the States, the obvious phrasing of section 2 would have been—

> "The Congress or the several States shall have power to enforce this article by appropriate legislation,"

or to the effect that—

> "The Congress shall have power to enforce this article by appropriate legislation, but in the absence of any such legislation by the Congress, the several States may pass appropriate legislation."

It is contended, however, that, despite the fact that the amendment in terms provides for its enforcement through the exercise of concurrent power, it may, nevertheless, be enforced by legistion of Congress acting alone, and that if federal and state legislation should at any time conflict, the federal legislation would have to prevail, because article VI of the Constitution provides that—

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land"

But this contention, as the minority report in the House of Representatives (*supra*) pointed out, entirely begs the question to be decided. The only laws which the Constitution ordains shall be "the

supreme law of the land" are those which are "made in pursuance of" the Constitution itself, and, if the eighteenth amendment, in providing for "concurrent power to enforce" its prohibitions, in truth requires concurrent action by the State and the Nation, then no enforcement law of Congress, not thus concurred in by the State, satisfies the requirement of the amendment, and, consequently, cannot be a law "made in pursuance" of the Constitution or any part of the supreme law of the land.

Manifestly, reference to the sixth article of the Constitution does not at all aid us or advance the consideration of the meaning and effect of section 2 of the amendment. Even if there were an inconsistency between these provisions, section 2 of the eighteenth amendment would have to prevail as "the last expression of the will of the lawmaker." *Schick* v. *United States*, 195 U. S. 65, 68-9.

It is, moreover, difficult to understand how the power of Congress can at one and the same time be declared concurrent with the power of the State, and yet be superior thereto even in respect of intrastate matters. If the enforcement legislation of Congress must be regarded as supreme, even to the extent of overriding state legislation relating to local self-government, then the constitutional grant of "concurrent power" of enforcement to the several States was plainly futile. Their legislation to enforce the constitutional prohibitions would then be wholly idle and vain

whenever it conflicted with legislation by Congress, and equally vain and idle when it accorded therewith. As Webster said in his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1, 15: "What sort of *concurrent* powers [are] these, which [can] not exist together?" A construction of this sort in effect nullifies the word "concurrent" in the amendment and disregards the limitation upon the power of Congress which that word imposes. Such a method of construction wholly ignores the fundamental rule that both the granting and the limiting clauses of the Constitution must be fairly construed. *Fairbank* v. *United States*, 181 U. S. 283, 288-9.

It is not reasonable to assume that the legislatures of the States which ratified the eighteenth amendment intended that the States should have power merely to concur in whatever enforcement provisions Congress saw fit to enact and power to legislate independently only when Congress was silent. On the contrary, it must have been understood and intended that the several States should have "concurrent power" in fact, that is, the duty and the power to concur in enforcement legislation by Congress operative within their respective borders, which legislation might be appropriate in some States and not at all appropriate elsewhere because of differing local conditions.

It should follow that, as the State of Rhode Island has not concurred in any of the drastic provisions of the act of Congress of October 28, 1919, the enforcement of which the present suit

seeks to restrain, the provisions and sanctions of such enactment cannot be enforced in that State with respect to local or intrastate traffic in intoxicating or non-intoxicating beverages.

This construction would harmonize and give effect to all the words of the amendment and make the whole amendment consistent and harmonious with our federal system. An examination into the force and effect of its provisions, as thus construed, will at once make this clear.

Thus, section 1 of the amendment, if valid, is self-executing, and by its own force deprives Congress of all power to authorize any foreign or interstate commerce in intoxicating liquors, and likewise by its own force deprives the States of all power to authorize local or intrastate commerce in intoxicating liquors within their respective borders. Either a federal or a state statute authorizing such commerce would be in conflict with the Constitution, and hence void.

Turning now to section 2, it is apparent that it was probably intended thereby to empower Congress to legislate for the enforcement of the prohibitions of section 1, in respect of the internal affairs of a State, only with the concurrence of the State affected thereby; and, conversely, to authorize a State to legislate similarly, in respect of foreign and interstate commerce, only with the concurrence of Congress. In this manner the right or power of a State to interfere with interstate or foreign commerce was prudently restrained and safeguarded by requiring the concur-

rence of the Congress, and the right or power of the Congress to interfere with local or intrastate affairs was likewise restrained and safeguarded by requiring the concurrence of the particular State. In other words, legislation by Congress interfering with local self-government in the States was not to be enforcible until and unless any State affected thereby concurred.

There is nothing novel in any such conception. In section 10 of article I of the Constitution there is a clear precedent therefor. Thus, it is there provided that—

> "No State shall, *without the consent of Congress*, lay any imposts or duties on imports or exports, ... [and that] no State shall, *without the consent of Congress*, lay any duty of tonnage, keep troops, or ships of war in time of peace," etc.

Plainly, here is a direct precedent in a requirement that the States shall not do the specified acts except with the concurrence of Congress. Had the noun "concurrence" been used instead of "consent," the meaning would have been identical.

Furthermore, requiring this legislative concurrence tended to assure the co-operation of the concurring States in the enforcement of the legislation of Congress, not only in respect of local or intrastate commerce, but of interstate and foreign commerce. How sound this suggestion is was practically shown by the recent declaration of the Commissioner of Internal Revenue, as published in the press, that the Federal Government was relying in great measure on the co-operation of

the several States for the enforcement of the National Prohibition Act.

On the other hand, this concurrence on the part of the Federal Government in the enforcement of *local* regulations might greatly aid the States and diminish their respective burdens of the cost of enforcement. It is novel and an anomaly in our federal system for local regulations and local affairs to be controlled or supervised by federal legislation and federal officers, and it was both politic and statesmanlike to avoid the reasonably certain conflict which would result if the exercise of the power of enforcement was not concurrent.

The language of the eighteenth amendment, it should be remembered, was not chosen by the States, but by Congress. It is manifest that the state legislatures in ratifying the amendment quite reasonably read the provision of section 2, in respect of the concurrent power therein granted, as above discussed. The language used is at least unquestionably susceptible of that construction. Common honesty therefore requires that that construction be adopted against the party whose language it is, namely, the Congress. *State* v. *St. Louis, S. W. Ry. Co.*, 197 S. W. 1012, 1013 (Tex.); *Alexander* v. *People*, 7 Colo. 155, 167. If the case at bar involved the interpretation of a contract, that would be the inevitable result; for, as has been well said (*White* v. *Hoyt*, 73 N. Y. 505, 511):

> "The rule in ethics is, that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promissor apprehended at the

> time the promisee received it,' and this is the established rule at law, as well as in morals."

Certainly the requirements of good faith must be at least as high as this, when Congres proposes to the States new terms of agreement fundamentally affecting their reserved powers of self-government.

It in no wise militates against these contentions to refer to the cases in which federal legislation has overridden similar state legislation. In those cases Congress was legislating under a power granted by the Federal Constitution, and the State under a distinct and independent power derived from its own constitution or flowing from its sovereignty. The source of the power exercised by Congress was higher than the source of the power exercised by the State; and, if there was a conflict, the State, of course, had to yield. *Gibbons* v. *Ogden*, 9 Wheat. 1, 164-5, 199, 238. But that is emphatically not the situation here. In the case at bar both the Congress and the State, in enforcing the eighteenth amendment, act under and by virtue of the *same* source of power, namely, section 2 of the eighteenth amendment. The court is, therefore, dealing with co-equal, and not with superior and subordinate, sources of power. The "concurrent power" of Congress and the States flows from one and the same source and depends upon the very same words in the same instrument. Plainly, therefore, neither can be supreme; they must, consequently, concur, or else the clear language of the Constitution is nullified.

In the case of courts of justice having concurrent jurisdiction, the nature of the power and subject matter precludes its exercise concurrently, since a particular action at law can be actually heard only in one tribunal if a practical result is to ensue. There is, however, no such obstacle to concurrence in the case of the power dealt with in section 2 of the eighteenth amendment.

VI.

THE FOREGOING CONTENTIONS PRESENT JUSTICIABLE QUESTIONS.

A.

In final analysis, the controlling inquiries in the case at bar are whether or not the so-called eighteenth amendment is authorized by the Constitution, and whether or not it has been proposed and ratified in accordance with the express requirements of the Constitution. The court is called upon to determine whether there are not two implied limitations upon the right to amend the Constitution, namely, (1) that no amendment shall in its primary and essential nature constitute mere legislation as distinguished from a constitutional provision, and (2) that no amendment shall directly and substantially tend towards the destruction of the right of the several States to local self-government. The court is further called upon to determine whether the Houses of Congress acted within their constitutional authority

in proposing the amendment without any finding that the amendment was "deemed necessary," and whether the amendment has been duly ratified by the requisite number of "legislatures" of the several States, in view of the fact that it was not submitted to the electorate in the States where the electorate has the initiative or referendum, or both, in respect of state legislation. In other words, the questions raised call upon the court to construe and enforce *implied and express limitations* of the Constitution upon the power to amend under article V. There is also involved a question as to the true construction of the provision for concurrent power. That is essentially a judicial question. Can the National Prohibition Act be enforced in the State of Rhode Island as to wholly local and intrastate traffic without its concurrence?

It is argued that the inquiry concerning the invalidity of the so-called eighteenth amendment presents, not a judicial, but solely a political question. A consideration of the nature of the complainant's contention, however, should at once disclose that this objection is untenable. The complainant's claim is that the so-called amendment, and the act of Congress enacted thereunder, destroy valuable businesses and properties in the State, as well as sources of revenue of the State, and that they do so without constitutional authority or due process of law, inasmuch as the so-called amendment was adopted in violation of the limitations

implied and inherent in article V of the Constitution. Of course, what is implied in the Constitution is as effectually a part of it as what is expressed therein (*Ex parte Yarbrough*, 110 U. S. 651, 658); and if the limitations above contended for do in truth inhere in the Constitution and thus qualify and limit article V, they must be accorded the same force and effect as if they were in express terms contained in that article. The court is, therefore, in the case at bar only called upon to construe article V of the Constitution and to determine whether the complainant's rights have been unconstitutionally invaded. That is an ordinary judicial controversy involving a justiciable question over which the courts plainly have jurisdiction. *Missouri* v. *Illinois & Chicago District*, 180 U. S. 208; *Kansas* v. *Colorado*, 185 U. S. 125, 142; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; *United States* v. *Lee*, 106 U. S. 196, 208-9; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Koehler & Lange* v. *Hill*, 60 Iowa 543, 623-4; *Hammond* v. *Clark*, 136 Ga. 313; 12 Corpus Juris, p. 880 and cases cited.

It is, of course, plainly the duty of the courts "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 176; The Federalist, No. 78 (Ford's ed.), p. 521. For that reason it is necessarily their duty to determine the constitutionality of a statute; and, for the same reason, it must be their duty to decide what is in law and in fact a part of the Constitution. *Ellingham* v. *Dye*, 19 N. E. 1, 21

(Ind.). How else can they know, declare and enforce only what is the law and nothing else? In *Cohens* v. *Virginia*, 6 Wheat. 264, 384, Chief Justice Marshall declared that—

> "The judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered."

The argument in opposition to the so-called eighteenth amendment that it tends towards the destruction of the right of the several States to local self-government, does not change the otherwise justiciable nature of the controversy. The authorities sustaining the principle announced and enforced in *The Collector* v. *Day*, 11 Wall. 113, conclusively dispose of this suggestion. That leading case held that a federal taxing act was invalid because it purported to tax a governmental instrumentality of a State, and that the ground of the decision was, not that there was any express constitutional provision to that effect, but solely the "necessary implication," derived from the Constitution and "upheld by the great law of self-preservation" (at pp. 125, 127). If the case at bar presents only a political controversy, then *The Collector* v. *Day*, and the well-considered authorities following it, were wrongly decided, because in them substantially the same contention as is here put forward was not only entertained as a justiciable question, but approved and enforced.

The case of *Georgia* v. *Stanton*, 6 Wall. 50, does not in any wise conflict with the foregoing contention. It would, indeed, be curious if it did, since the opinion of the court in that case and in the later case of *The Collector* v. *Day* were both delivered by Mr. Justice Nelson. In *Georgia* v. *Stanton* the State sued to enjoin the carrying out by the defendants of the so-called "Reconstruction Acts" which Congress had passed after the Civil War in order to establish a republican form of government in the rebel States. The duty to secure to the States a republican form of government and the right to decide what kind of state government is republican in form, are exclusively vested in the political departments of the Federal Government. *Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 234. The validity of the Reconstruction Acts was, consequently, not open to question in the courts; and the defendants in *Georgia* v. *Stanton* were acting under laws which the legislative department of the Government had a right to pass and the courts no rights to review; and the suit was, therefore, one not maintainable, not only as involving a political question, but as in effect a suit against the United States itself. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68-9. The present suit is against officers specially charged with the enforcement of an act of Congress which is alleged to be unconstitutional. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619.

Nor is there anything novel in the nature of the questions discussed in the preceding points of this brief, for questions quite similar in character have been repeatedly before the courts and have been adjudicated as ordinary justiciable questions. Thus, for example, in *Eason* v. *State*, 11 Ark. 481, 491, and *State* v. *Keith*, 63 N. Car. 140, 144, constitutional amendments purporting to nullify essential parts of the bill of rights were held invalid and unauthorized because of the necessary implications deemed by the court to arise out of the constitutions there under consideration operating to forbid amendments of such a nature; and in *Knight* v. *Shelton*, 134 Fed. 423, 426, and *Koehler & Lange* v. *Hill*, 60 Iowa 543, 603, constitutional amendments were likewise held void by the courts for failure to comply with *express conditions* prescribed in constitutions for their amendment. As stated by a learned court after an exhaustive review of the point (*McConaughy* v. *Secretary of State*, 106 Minn. 392, 409):

> "The authorities are practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing constitution is a judicial question."

The opposite view, as Chief Justice Day pointed out in *Koehler & Lange* v. *Hill*, *supra*, in effect amounts to a declaration—

> "That the provisions of the Constitution for its own amendment are simply directory and may be disregarded, with impunity; for it is idle to say that these requirements of

> the Constitution must be observed, if the departments charged with their observance are the sole judges as to whether or not they have been complied with."

See, also, the reasoning in *Bott* v. *Secretary of State*, 63 N. J. L. 289, and *Oakland Paving Co.* v. *Hilton*, 69 Cal. 479.

It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined within fixed or prescribed limits. Any such doctrine would empower agents of the government or of the people to exceed their authority at pleasure. As the authorities cited disclose, the weight of judicial opinion has regarded the question whether an amendment to a state constitution has been duly adopted as involving an ordinary judicial inquiry. It would seem, therefore, necessarily to follow that the same conclusion is *a fortiori* correct in respect of an amendment to the Federal Constitution. Amendments to the Federal Constitution have so far been solely the work of delegated agents, namely, the Houses of Congress and the legislatures of the States; the people *as such* have not been consulted. It ought, consequently, to be a justiciable question whether these agents have or have not transcended their limited authority. Where state constitutions are amended the proposed amendment is in every instance submitted to the people to pass

upon. In such cases it might be proper to view the limitations upon the power to amend state constitutions merely as directory and to regard the vote of the people as corrective and conclusive; but, nevertheless, as we have seen above, even amendments to state constitutions, directly voted upon by the people of the States, have been held null and void when they conflicted with any of the express or implied constitutional limitations upon the amending power.

It should further be borne in mind that the question is not whether a *constitution* is valid. A court organized and holding office under a constitution is not to be considered authorized to decide whether that constitution exists. It owes its very existence and whatever authority it has to that constitution; it is sworn to uphold that very instrument; the case which would raise any question of the validity of the constitution could only come before it under the selfsame constitution, and, therefore, both the court and the parties should not be heard to repudiate the existence of that constitution. A decree of a court that a constitution was illegal *in toto* might operate to leave no lawfully constituted authority in power and remit the people to a state of anarchy. None of these considerations, which might render wholly political and non-justiciable the question whether the government and its constitution are lawful, are in any wise operative in the case at bar. The complainant is but seeking to uphold and enforce

the Constitution of the United States and its limitations and provisions. There is, therefore, no vestige of similarity between such a case as this and those controversies illustrated by authorities like *Luther* v. *Borden*, 7 How. 1, which involved questions essentially political and non-justiciable in their character.

An effort was made by counsel in the District Court of New Jersey to distinguish the cases which had held void constitutional amendments not adopted in accordance with the procedure prescribed in a state constitution, from a case in which it was objected that the attempted amendment was of such a nature as not to be a legitimate or authorized subject of a constitutional amendment. The former was conceded to present a justiciable controversy; the latter, it was contended, did not. The distinction, however, is quite untenable. It exalts requirements of a constitution having to do with matters of mere form over requirements in the same instrument governing the most serious matters of substance. If one essential limitation of a constitution may be regarded as more binding than another, it is manifest that one relating to substance should take precedence over one relating merely to procedure. But the argument in question attempts to reverse this obvious relation, and affords judicial protection to matters of form, while denying any right to the courts to protect even the most momentous requirements of substance. As might be expected,

such a contention is without support in authority; and, indeed, as stated above, was ruled to the direct contrary in *Eason* v. *State*, 11 Ark. 481, 491. See, also, *Ellingham* v. *Dye*, 19 N. E. 1, 21, where it was said that:

> "The power to determine and declare the law covers the whole body of the law, fundamental and ordinary; the latter being those laws which apply to particulars and are tentative, occasional, and in the nature of temporary expedients. *Whether legislative action is void for want of power in that body*, or because the constitutional forms or conditions have not been followed or have been violated, may become a judicial question, and upon the courts the inevasible duty to determine it falls. And so the power resides in the courts, and they have, with practical uniformity, exercised the authority to determine the validity of proposal, submission, or ratification of changes in the organic law. Such is the rule in this state."

B.

Equally untenable is the contention that the proclamation of the acting Secretary of State of the United States, announcing the due ratification of the amendment, has rendered nonjusticiable in the courts the question of the validity and due adoption of the alleged eighteenth amendment.

The foremost fact to bear in mind in connection with this contention is that the Constitution of the United States does not provide for any finding, determination, or even notice of an amend-

ment by the Secretary of State or any other officer. Article V merely declares that an amendment which has been duly proposed "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States." By the express declaration of the Constitution, therefore, only an amendment which has actually become such in truth and in law is provided for, and not an amendment which some ministerial or legislative officer believes or declares to have validly become a part of the Constitution. Thus, an amendment which had been duly ratified by the legislatures of three-fourths of the States would automatically become part of the Constitution despite the fact that a Secretary of State might refuse to announce it because he erroneously believed the ratifications to be defective for some reason. No court would hesitate to disregard his error of law or fact under the circumstances supposed. Likewise, the action of a Secretary of State in proclaiming that an amendment was in effect, when it had not yet been ratified by the requisite number of States, or when it had not yet been ratified by all the houses of the legislature in the requisite number of States, would have to be regarded as a nullity. Any other result would mean that amendments could be made to the Constitution only if they won the approval of the Secretary of State. Such an interpretation of the fundamental law is plainly erroneous. To refuse an injured

State the right to call the action of the Secretary of State into question in the courts, would be, to all practical intents and purposes, refusing to uphold the Constitution and permitting it to be nullified at will by a mere ministerial officer.

This very amendment and what has been done under it disclose the soundness of this view. Every department of the Federal Government has assumed or declared that the eighteenth amendment became law on January 16, 1919, when the requisite number of States are supposed to have ratified it, and thus became enforceable on January 16, 1920, according to its terms. But, as the court will perceive on reading the proclamation of the acting Secretary of State, the only date mentioned therein is January 29, 1919. The Secretary does not so much as refer to January 16, 1919, and if his declaration or finding were necessary or could be effective for any purpose, it is plain that this amendment could not be properly regarded as law by any one prior to January 29, 1919. The reason, however, why no one can logically argue for such an outcome is obvious. It is merely because the Constitution itself in article V has in mandatory terms provided that an amendment "shall be valid to all intents and purposes as part of this Constitution," not when so found or declared by the Secretary of State or any one else, but solely "when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or

the other mode of ratification may be proposed by the Congress."

The Constitution having provided the circumstances under which an amendment shall become effective, of course Congress may not add to or detract from them. Otherwise, Congress would have power to override or nullify the Constitution. It follows that even if there were a statute remitting to the Secretary of State the right conclusively to determine whether a proposed amendment was in force and effect, it would be a mere nullity. But there is in fact no such statute. Section 205 of the Revised Statutes does not even purport to vest any such authority. It merely provides that—

> "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

Accordingly, the Secretary of State may give notice only when an amendment in fact "has been adopted according to the provisions of the Constitution," and not otherwise; and even then may only certify, not that he now finds or declares the amendment to be valid, but only that because

theretofore duly adopted, "the same has become valid," etc. The Secretary of State, in acting under section 205 of the Revised Statutes, is performing a ministerial and not a judicial function, and if he errs, it must be manifest that his errors, whether of fact or law, are binding on no one and may be corrected by the courts.

There is an unbroken current of authority which supports these views. *Hawke* v. *Smith*, Court of Common Pleas, Franklin County, Dillon, J., June 19, 1919, affirmed by the Ohio Supreme Court, September 30, 1919; *McConaughy* v. *Secretary of State*, 106 Minn. 392, 408-14; *Knight* v. *Shelton*, 134 Fed. 423, 438-40; *Bott* v. *Secretary of State*, 63 N. J. L. 289. In *Hawke* v. *Smith*, *supra*, the court dealt with the precise question herein involved, and held that the proclamation of the acting Secretary of State "of course, has no legal force or effect" upon the case. The same view has recently been expressed by District Judge Rudkin in the *Matter of Dillon*, U. S. D. C., N. D. Cal., January 27, 1920, who said:

> "The promulgation of a constitutional amendment under section 205 is no more essential to its validity than is the promulgation of an act of Congress under the preceding section, and the former is no more the beginning of the amendment than the latter is the beginning of the law. For, notwithstanding the requirement for promulgation, it is universally recognized that an act of Congress takes effect and is in force from the date of its passage and approval, and a constitutional amendment is likewise in full force and effect from and after its ratification by the requisite number of States."

In the well-considered case of *McConaughy* v. *Secretary of State, supra,* the court after an extensive review of the authorities, said:

> "The recent case of *Rice* v. *Palmer,* 78 Ark. 432, 440, presented the identical question which we have under consideration. In reference to the contention that the constitution intended to delegate to the Speaker of the House of Representatives the power to determine whether an amendment had been adopted, and that the question was political, and not judicial, the court observed: 'This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but, with possibly a few exceptions, it is not found in the prevailing opinion.' . . .
>
> "There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the constitution has been amended in the manner required by the constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. There is some authority for the view that *when the constitution itself* creates a special tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is true when it clearly appears that such was the intention of the people when they adopted the constitution. The right to provide a special tribunal is not open to question; but it is very certain that the people of Minnesota have not done so."

It must, therefore, be manifest that the Constitution of the United States does not make the Secretary of State or any other non-judicial body a special tribunal to determine whether the Constitution has or has not been amended; and it is equally plain that section 205 of the Revised Statutes does not purport to do so. But even if it did, it would be of no effect; the Constitution cannot be validly amended except in compliance with its own provisions, both those expressed and those implied. It is the duty of the courts to say what the Constitution means and requires, and it is elementary that Congress cannot derogate from the judicial power and vest judicial duties in non-judicial officers. If, consequently, Congress had attempted in section 205 to make the Secretary of State the sole judge of the question whether the Constitution had or had not been properly amended, its action would be void. So the court declared in *Knight* v. *Shelton*, 134 Fed. 423, 439, where the following language was used:

> "In neither of these acts did the Legislature attempt to make the decision of the canvassing board conclusive, and for this reason it is unnecessary to determine whether it possessed such power, which, in view of the fact that the Constitution established three departments—the legislative, executive, and judicial—and vested all judicial powers in the judicial department except jurisdiction to determine contests for certain state officers hereinbefore mentioned, is at least doubtful. To hold, in the absence of any express provision in the Constitution depriving the judicial department of the state of any of the

functions which naturally belong to that department, that the Legislature could take away that power would be violative of the spirit which pervades not only the Constitution of this state, but that of every other state of this Union. It would, in effect, make that department an inferior, and not a co-ordinate, branch of the government. The independence of the courts in unhesitatingly declaring acts in conflict with the Constitution void, and thus reviewing the acts of the legislative department of the state, has done more to preserve the blessings of liberty which we now enjoy than any other act of any department of the government."

Conclusion.

For the foregoing reasons it is submitted (1) that the defendants' motion to dismiss the bill of the State of Rhode Island for want of equity should be denied, (2) that the alleged eighteenth amendment should be declared invalid, and (3) that the National Prohibition Act, being the act of Congress of October 28, 1919, should be held unenforcible in the State of Rhode Island.

Washington, D. C., March 8, 1920.

Elihu Root,
William D. Guthrie,
Robert Crain,
Bernard Hershkopf,
As *amici curiae* and of counsel
for United States Brewers
Association.

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Supreme Court of the United States.

October Term, 1919.

No. 29, Original.

STATE OF RHODE ISLAND,
COMPLAINANT,

v.

A. MITCHELL PALMER, Attorney General,
and
DANIEL C. ROPER,
Commissioner of Internal Revenue,
DEFENDANTS.

Brief of Alexander Lincoln and Michael J. Lynch, as Amici Curiae, In Support of Original Bill.

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Supreme Court of the United States.

October Term, 1919.

No. 29, Original.

STATE OF RHODE ISLAND, *Complainant,*

v.

A. MITCHELL PALMER, ATTORNEY GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, *Defendants.*

Brief of Alexander Lincoln and Michael J. Lynch as Amici Curiae in Support of Original Bill.

INTRODUCTION.

This brief is filed in behalf of George C. Dempsey, a citizen of Massachusetts having large interests as trustee in brewing companies in the State of Rhode Island, and The James Hanley Brewing Company, a corporation organized and existing under the laws of the State of Rhode Island, plaintiff in a suit in equity against Harvey A. Baker, United States Attorney for the District of Rhode Island, and George F. O'Shaunessy, Collector of Internal Revenue for the District of Rhode Island, Defendants, which suit is now pending in said District Court, and involves the question of the constitutionality and validity of the so-called eighteenth amendment of the Constitution of the United States.

Text of the Eighteenth Amendment.

The eighteenth amendment reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

ARGUMENT.

The Contention here Expounded.—

The Eighteenth Amendment, so called, is Not Such an Amendment to the Constitution as is Authorized by Article V, and was Beyond the Power of the Amending Bodies, therein Appointed, to Propose and Ratify.

It is important in the first place to limit and define the issue herein to be discussed. There are a number of grounds, some of them having considerable weight, on which it has been and will be contended that the eighteenth amendment is invalid. This brief, however, deals only with the fundamental question whether the eighteenth amendment, although it has been declared by the executive branch of the government to be a part of the Constitution, is such an amendment as is authorized by Article V of the Constitution, and whether its adoption was within the power of the bodies vested by that article with the power of amendment. We propose to show that this question must be answered in the negative, and that the amendment therefore is not valid.

A Preliminary Observation.—

The Eighteenth Amendment has No Validity as a Constitutional Provision unless Authorized by Article V. It was Not Proposed by a Constitutional Convention, nor was It Ratified by the People or by Conventions in the Several States.

The question under discussion is primarily one of interpretation of Article V of the Constitution. That article is as follows:

"The Congress, whenever two thirds of both

Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article [relating to slavery]; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The amending agency thereby appointed is a complex representative body consisting of two thirds of both houses of Congress or a convention called by Congress on the application of the legislatures of two thirds of the several states, and the legislatures of three fourths of the several states or conventions in three fourths thereof. It is not a constitution-making body, but a body exercising *delegated* power.

> "The public bodies which are to be the agents for amending the Constitution are those which are authorized to propose amendments, and those which are authorized to adopt them and make them a part of the instrument.
>
> . . . . . .

"It will be observed that the amending power is not a power to be exercised by a majority of the people of the United States, acting as a mass of individuals, or as a collective people. It is to be exercised by three fourths of the states, a constitutional majority of the members of the Union fixed for this special purpose. It may thus happen that a proposed amendment would be ratified by a less number than a majority of the people of all the states, because of the mode of ratification and the fixed constitutional number of the state legislatures or state conventions which would have the power to ratify it.

"All this shows, on the one hand, how careful the framers of the Constitution were, in shaping the amending power, to preserve the state sovereignties; and, on the other hand, how far their system removes the amending power from the action of the people of the United States regarded as a nation."

Curtis, Constitutional History of the United States, vol. II, c. VI, pp. 152, 153.

"Whether an amendment is proposed by Congress, or by a convention, it is ratified or rejected by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly. The people, have no direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted."

Watson on the Constitution, vol. II, p. 1310.

As was well understood when our Constitution was adopted, constitutions are *made* only by proposal in convention and ratification by the people themselves, and a federal constitution, such as the Constitution of the United States, only by the unanimous ratification of the states, acting, not through their legislatures, but either through conventions in the states or by direct submission to the people.

> Constitution of the United States, Article VII:
>
> "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

> *M'Culloch* v. *Maryland,* 4 Wheat. 316, 403, 404:
>
> "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act

safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."

Jameson on Constitutional Conventions (4th ed.).

Cooley, Constitutional Limitations (7th ed.).

The eighteenth amendment has not been adopted as an original constitutional provision by the people of the United States. It was not proposed by any constitutional convention, nor has it ever been submitted to the people of the several states, directly or in convention assembled, for ratification. Three sovereign states have declined to ratify the amendment, and the other states have acted solely through their legislatures, even although in a number of states their own constitutions require submission to the people by a referendum. Indeed, so hasty was the action that in many states the people had no chance to express themselves even by a choice of legislators. In the one state, Ohio, where a referendum has been had, the people voted against ratification. It is doubtful whether a majority of the people were ever in favor of the adoption of the amendment.

It is only through the original Constitution, if at all, by virtue of the authority given by Article V, that the will of the people in their constitution-making capacity has been expressed. Our contention is that the so-called eighteenth amendment is not such an amendment as is authorized by Article V, and that it was beyond the power of the amending agency, therein appointed, to propose and ratify such an amendment.

The case here presented is entirely novel. So far as is known there is no decision on the point. Previous decisions of the Supreme Court involving the subject of intoxicating liquor have sustained the power of the state to prohibit in the exercise of its police power, or the power of Congress to regulate or prohibit as a part of its authority over interstate commerce or as a war-time measure. None of these cases is in point,

except in so far as they recognize and emphasize the supremacy of the police power of the states, and in that respect, in their implications, they are favorable to our contention.

License Cases, 5 How. 504.
Beer Co. v. *Massachusetts*, 97 U.S. 25.
Mugler v. *Kansas*, 123 U.S. 623.
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U.S. 311.
United States v. *Hill*, 248 U.S. 420.
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, U.S. Adv. Ops. 1919-20, p. 115.
Ruppert v. *Caffey*, U.S. Adv. Ops. 1919-20, p. 138.

The importance of the subject and the responsibility imposed upon the Supreme Court in reaching a decision cannot be better stated than in the words of Chief Justice MARSHALL, in the case of *M'Culloch* v. *Maryland*, 4 Wheat. 316, 400, 401:

> "The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious na-

ture; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."

Outline of Argument.

A statement at this point of an outline of the argument will be useful. It is this:

The word "constitution" means frame of government. A constitution is an expression of the fundamental principles of government, which in the science of jurisprudence are carefully to be distinguished from ordinary laws.

Written constitutions became historical facts at the time of the American Revolution. The state constitutions then adopted had two aspects, containing both a framework of government and a bill of rights, incorporating principles of liberty inherited from the Magna Charta.

The Constitution of the United States has this same dual aspect, but the government established by it is a federal government of limited and enumerated powers, for national purposes, all other powers being reserved to the states, whose sovereignty was carefully preserved. The Constitution created an indestructible union of indestructible states.

The Constitution, with all its amendments, contains no provision interfering with the local police power of the states, and no provision in the nature of an ordinary law regulating the conduct of the people. Any such provision is entirely outside the lines of the Constitution and foreign to its nature and purposes.

The word "amendment" means, and was intended

by the framers of the Constitution as used in Article V to mean, a change within the lines of the original Constitution. Article V does not and was not intended to authorize amendments making changes outside those lines, and especially changes interfering with the police power of the states or changes incorporating mere rules of civil conduct. The power to amend granted to the amending agency by Article V is a power to make changes within constitutional lines. It does not give that body any power to legislate, all legislative powers being vested in Congress by Article I. Nor does it permit the right of local self-government, which is incident to a republican form of government, to be taken away from the states.

The proposed change known as the eighteenth amendment is objectionable both because it strikes at the foundation of the right of the states to local self-government, and because it is nothing but ordinary legislation attempting to regulate the conduct of the people. Its adoption was entirely beyond the power of the amending agency. It seriously threatens the existence of our indestructible union of indestructible states. It should therefore be declared invalid.

I.

The Constitution is a Framework of Federal Government and Bill of Rights.

THE NATURE OF A CONSTITUTION.

The term "constitution" means a form or framework of government. Consistently with this meaning a constitution is universally defined to be in its essence a framework of government.

A constitution "is a permanent form of government."

Story on the Constitution (5th ed.), sec. 352.

A constitution is "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."

Cooley, Constitutional Limitations (7th ed.), p. 4.

"By the Constitution of a commonwealth is meant, primarily, its make-up as a political organism; that special adjustment of instrumentalities, powers, and functions, by which its form and operation are determined."

Jameson on Constitutional Conventions (4th ed.), sec. 63.

"The term 'constitution' is usually applied to an attempt to embody in a single authoritative document, or a small group of documents, the fundamental political institutions of a state."

Lowell's Government of England, vol. 1, p. 1.

"It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established."

PATTERSON, J., in *Vanhorne's Lessee* v. *Dorrance,* 2 Dall. 304, 308.

Interwoven with this primary characteristic of a constitution as a *form of government,* both abroad and

in the written constitutions adopted by the states of this country in Revolutionary times, are certain fundamental principles of liberty which when grouped together are commonly called a *bill of rights.*

2 Kent's Commentaries, Lecture XXIV.

Cooley, Constitutional Limitations (7th ed.), pp. 65-68.

Jameson on Constitutional Conventions (4th ed.), secs. 96, 97.

Dicey's Law of the Constitution (7th ed.), pp. 191-197.

Stevens' Sources of the Constitution of the United States, c. VIII.

Hurtado v. *California,* 110 U.S. 516, 531, 532.

In many of the states which had written constitutions prior to the adoption of the Constitution of the United States, those constitutions were formally divided into two parts—the first a Declaration or Bill of Rights, and the second a Form or Frame of Government.

A constitution is not a code or body of laws. It does not properly contain rules governing the conduct of individuals. The distinction between such rules of conduct and the fundamental laws or principles of which a constitution is composed is plain, and has sometimes, though apparently not frequently, been pointed out.

Vanhorne's Lessee v. *Dorrance,* 2 Dall. 304, 308.

Commonwealth v. *Griest,* 196 Pa. St. 306, 404.

Warfield v. *Vandiver*, 101 Md. 78, 115.
Jameson on Constitutional Conventions (4th ed.), secs. 85, 87, 370, 371.
Cooley, Constitutional Limitations (7th ed.), p. 114.

Jameson's statement is so excellent as to deserve quoting at length. He says (sec. 85):

> "Before proceeding to the task indicated, however, it may be useful to ascertain with precision the distinction between a *Constitution* or *fundamental ordinance*, and an *ordinary municipal law*. Both must be denominated laws, since they are equally 'rules of action laid down or prescribed by a superior'. Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine. Fundamental laws precede

ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws, are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and express, as we have said, the expedient, or the right viewed as the expedient, under the varying circumstances of time and place."

Municipal law may be defined as "a rule of civil conduct, prescribed by the supreme power of a state."

1 Kent's Commentaries, p. 447.

THE NATURE OF THE CONSTITUTION OF THE UNITED STATES.

The Constitution of the United States (prior to the so-called eighteenth amendment) conforms exactly to this general description of a constitution. It is both a framework of government and a bill of rights.

"At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of a government, to set up its frame-work, and to establish merely the general principles by which it was to be animated . . ."

PITNEY, J., in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 227.

See also The Federalist, No. 84.

Story on the Constitution, secs. 355, 372, book III, c. XLIV.

Stevens' Sources of the Constitution of the United States, c. VIII.

Let us analyze the document itself.
The preamble is as follows:

> "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America."

Thus the purpose of the Constitution is declared to be to form a union of the states and to establish a form of government for the people of the United States, with the object of securing the benefits therein named, all of which are summarized by the concluding phrase—"the Blessings of Liberty to ourselves and our Posterity."

Chisholm v. *Georgia*, 2 Dall. 419, 474, 475.
United States v. *Cruikshank*, 92 U.S. 542, 549, 550.
Story on the Constitution (5th ed.), book III, c. VI.

Having the preamble in mind, Story says of the Constitution:

> "The design is to establish a form of government. . . . The object was to secure the blessings of liberty to the people and to their posterity."

Story on the Constitution (5th ed.), sec. 355.

The body of the original instrument may be summarized as follows:

Article I grants to Congress certain enumerated legislative powers, designed to meet national requirements, and forbids the exercise of certain powers by Congress and the exercise of certain powers by the states. Section 9 of this article is in the nature of a bill of rights (The Federalist, No. 84; *Barron* v. *Mayor &c. of Baltimore,* 7 Pet. 243, 248).

Article II provides that the executive power shall be vested in the President, and defines that power.

Article III provides that the judicial power of the United States shall be vested in the Supreme Court and other inferior courts, and defines that power.

Article IV deals in a general way with the relations between the different states and their citizens. It restricts in certain ways the powers of the states, and contains certain guaranties to the states and their citizens. It guarantees to every state a republican form of government.

Article V is the article providing for amendment of the Constitution.

Article VI declares that this Constitution, with the laws made in pursuance thereof and all treaties made under the authority of the United States, shall be the supreme law of the land.

Article VII provides for ratification of the Constitution by the states.

The first ten amendments constitute the "Bill of Rights," so called, reserving to the people certain fundamental rights in addition to those reserved in the original instrument (*Monongahela* v. *United States,* 148 U.S. 312, 324; *Maxwell* v. *Dow,* 176 U.S. 581, 606, 607). Article X expressly provides that "the powers not delegated to the United States by the Constitution,

nor prohibited to it by the States, are reserved to the States respectively, or to the people." These amendments limit the powers of the federal government.

> "They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States."
>
> *Barron* v. *Mayor &c. of Baltimore,* 7 Pet. 243, 250.
> *United States* v. *Cruikshank,* 92 U.S. 542, 552.
> *Spies* v. *Illinois,* 123 U.S. 131, 166.

This brief analysis of the provisions of the Constitution with the first ten amendments (which are commonly regarded as a part of the original instrument) shows that it is, as stated above, both a framework of government and a bill of rights. It has one further fundamental characteristic, namely, that the government established is one of limited and enumerated powers, necessary or suitable for the effective maintenance of a federal government, all other powers being reserved to the states.

The purpose and effect of the Constitution, as disclosed by the instrument under which the government was organized, may, therefore, be said to be to secure a federal government with limited and enumerated powers, for national purposes, reserving all other powers to the states and the people, and to preserve the rights and liberties of the people.

> *M'Culloch* v. *Maryland,* 4 Wheat. 316, 405.
> *United States* v. *Cruikshank,* 92 U.S. 542, 549-551.

In the latter case the court, by Chief Justice WAITE, said:

> "Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty' to themselves and their posterity (Const. Preamble) ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.
>
> . . . . . .
>
> "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

The later amendments, down to and including the seventeenth amendment, including, as we shall see, the

thirteenth, fourteenth, and fifteenth, or so-called war amendments, may all be classified as modifying in some particular the scheme of government, or as expounding more clearly or extending the application of those fundamental principles which are embodied in the Bill of Rights.

The eleventh amendment declares that the judicial power of the United States shall not extend to suits against one of the United States by citizens of another or a foreign state. The twelfth changes the method of electing the President and Vice-President. The sixteenth grants power to Congress to lay and collect taxes on incomes. The seventeenth provides for the election of senators by the people of the states.

The thirteenth amendment, to which reference will be hereafter more particularly made, declares that slavery shall not exist in the United States. Section 1 of the fourteenth amendment defines citizenship of the United States and of the states, and forbids the invasion by the states of some of the principles of the Bill of Rights. The remaining sections provide for a reduction in the basis of representation in states denying the right of male citizens of full age to vote, forbid persons to hold office under the United States or any state who have engaged in rebellion in violation of their oath of office, and declare debts incurred in aid of rebellion and claims for loss or emancipation of slaves illegal and void. The fifteenth amendment forbids discrimination against the right of citizens to vote, on account of race, color, or previous condition of servitude. In each of these amendments Congress is given power to enforce its provisions by appropriate legislation.

None of the amendments subsequent to the Bill of Rights, as will be shown presently in more detail, has the effect of altering the fundamental characteristics of the Constitution as a form of federal government and bill of rights. In none of them, it seems (although this further step is not required to be taken for the purposes of the argument here presented), are any of the powers reserved to the states surrendered by them and given to the federal government. The powers of the states are restricted in these amendments, apparently, only by further or express application of the principles of political liberty and a republican form of government such as was guaranteed to the states by the Constitution.

Except in respect to the thirteenth, fourteenth, and fifteenth amendments there can be no question as to the truth of this proposition. Analysis of these amendments will show they are merely additional guaranties of human rights. Their sole object was to confirm the freedom and civil rights of the negro in this country. They did not deprive the states of any of their sovereign powers, consistent with the principles of Magna Charta.

Slaughter-House Cases, 16 Wall. 36, 67-72:

> "The most cursory glance at these articles [the thirteenth, fourteenth, and fifteenth amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and

the necessity for recurring again to the great source of power in this country, the people of the States, *for additional guarantees of human rights;* . . . no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

United States v. *Reese,* 92 U.S. 217, 218:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. . . . Previous to this amendment, there was no *constitutional guaranty* against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."

United States v. *Cruikshank,* 92 U.S. 542, 554, 555:

"The fourteenth amendment prohibits a State

from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. *It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.* As was said by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

. . . . . .

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

See also *Davidson* v. *New Orleans,* 96 U.S. 97.
Ex parte Virginia, 100 U.S. 339, 344, 345.
Civil Rights Cases, 109 U.S. 3.

ne institution of slavery was contrary to the
usetts Declaration of Rights was held by the
usetts court in 1781, in the case of *Commonwealth v. Jennison* (see Mass. Law Quarterly, vol. II, pp. 437-441).

Nor did the adoption of these amendments operate to change the previous rights or status either of the slaves or of their owners. At the time of the adoption of the thirteenth amendment, on December 18, 1865, slavery had already been abolished by the Emancipation Proclamation of 1863 and the successful termination of the War of the Rebellion.

Slaughter-House Cases, 16 Wall. 36, 68.

It is significant that the validity of these amendments was not questioned, and that they were accepted and ratified by all the southern states.

Curtis, Constitutional History of the United States, vol. II, pp. 161, 498.

Whatever may be the extent and effect of these amendments, it is at any rate certain, as stated above, that they did not alter the fundamental characteristics of the Constitution as a form of federal government and bill of rights, and that the Constitution has maintained those characteristics up to the present time.

THE CONSTITUTION CONTEMPLATES AN INDESTRUCTIBLE UNION OF SOVEREIGN AND INDESTRUCTIBLE STATES.

The Constitution found the states as separate sovereignties. It was the purpose of the Constitution to preserve and protect those sovereignties in their local

spheres and to form and maintain a Union of free and independent states. It contemplates, not a centralized government subdivided into various merely geographical parts, but "an indestructible Union composed of indestructible States."

M'Culloch v. *Maryland,* 4 Wheat. 316, 403:

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

Gibbons v. *Ogden,* 9 Wheat. 1, 195:

> "The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

Lane County v. *Oregon,* 7 Wall. 71, 76:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the neces-

sary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized."

Texas v. *White*, 7 Wall. 700, 725:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The Collector v. *Day*, 11 Wall. 113, 124, 125:

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. . . . Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and respon-

sible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government. . . ."

Keller v. *United States*, 213 U.S. 138, 149:

"We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' "

THE CONSTITUTION DOES NOT CONTAIN ORDINARY MUNICIPAL LAWS, OR LAWS FOR THE PURPOSE OF REGULATING THE INTERNAL AFFAIRS OF THE STATES.

Concerning this instrument, with all previous amendments, these observations may be made as to what it does not contain:

1. *The powers given to the federal government are only those which are necessary to the existence and effective maintenance of the nation. There is no provision suggesting the exercise by the United States of any branch of that system of internal regulation called the police power, or power of local self-government. That power was intended by the framers of the Constitution to be reserved to the states and has always been regarded as peculiarly within their jurisdiction.*

The police power is a necessary part of the sovereign powers of the states. It is an indispensable incident of the republican form of government which is guaranteed to every state by Article IV of the Constitution. The police powers of a state, it has been said, "are nothing more or less than the powers of government

inherent in every sovereignty to the extent of its dominions."

TANEY, C.J., in the *License Cases,* 5 How. 504, 583.

See also *Noble State Bank* v. *Haskell,* 219 U.S. 104, 111.

Sligh v. *Kirkwood,* 237 U.S. 52, 59.

Certainly without that power the states could not exist as independent and "indestructible" entities.

The Supreme Court has consistently stated that the thirteenth, fourteenth, and fifteenth amendments did not interfere with the police power of the states.

Following are numerous citations and quotations from opinions of the Supreme Court in support of the above propositions:

Dartmouth College v. *Woodward,* 4 Wheat. 518, 629:

"That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted."

New York v. *Miln,* 11 Pet. 102, 139:

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by

the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

License Tax Cases, 5 Wall. 462, 470, 471.
United States v. *Dewitt*, 9 Wall. 41.
Slaughter-House Cases, 16 Wall. 36, 62-64.

Bartemeyer v. *Iowa*, 18 Wall. 129, 138 (FIELD, J., concurring):

"No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose."

Beer v. *Massachusetts*, 97 U.S. 25.
Patterson v. *Kentucky*, 97 U.S. 501, 503-506.
Stone v. *Mississippi*, 101 U.S. 814, 819, 820.

Barbier v. *Connolly*, 113 U.S. 27, 31:

"But neither the amendment [fourteenth amendment]—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Mugler v. *Kansas*, 123 U.S. 623, 657-667.
Kidd v. *Pearson*, 128 U.S. 1.

In re Rahrer, 140 U.S. 545, 554, 555:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

. . . . . .

"The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest Congress with power to legislate

upon subjects which are within the domain of state legislation."

Keller v. *United States*, 213 U.S. 138, 144-149.

Hammer v. *Dagenhart*, 247 U.S. 251, 274-276:

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. . . . The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. . . . Thus the act in a twofold sense is repugnant to the Constitution. It not only

transcends the authority delegated to Congress over commerce but also exerts a power as to purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, *and thus our system of government be practically destroyed.*"

United States v. *Hill*, 248 U.S. 420, 428 (dissenting opinion).
United States v. *Doremus*, 249 U.S. 86, 95 (dissenting opinion).

The Federalist, No. 45:

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Cooley, Constitutional Limitations (7th ed.):

"The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government" (p. 243).

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress" (p. 831).

Miller on the Constitution of the United States, p. 412:

"The necessity of the great powers, conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex government."

2. *There is no provision in the Constitution or any of its amendments restricting the rights of the people, regulating their conduct, or providing that any acts of individuals shall be unlawful.*

It may be suggested that in respect to the thirteenth amendment this statement is not true; that that amendment does operate directly on the acts of individuals.

The language of the amendment is as follows:

"ARTICLE XIII.

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment does not purport to restrict the rights of the people by laying down rules of conduct, but rather to secure liberty to human beings, in accordance with the stated purposes of the Constitution, by declaring that the status of slavery, already done away with by the Emancipation Proclamation, should not be re-established by any government within the United States. It is, as has been stated, an additional guaranty of human rights. It does not declare any act to be unlawful, but gives Congress power to enforce the article by appropriate legislation.

The thirteenth amendment, then, appears to be nothing more than an addition to the Bill of Rights, securing the blessings of liberty to the people of the United States and their posterity.

Thus it appears from an analysis of the Constitution, with all the amendments down to the eighteenth, that its provisions are wholly fundamental laws, granting to the federal government enumerated powers for national purposes, reserving to the states all other powers, and securing the liberties of the people; that the right of the states to regulate their internal affairs was never surrendered; and that there is no provision which is an ordinary municipal law as distinguished by Professor Jameson.

THE CONSTITUTION WAS MADE SUPREME AND PERMANENT BECAUSE IT WAS A FORM OF GOVERNMENT AND BILL OF RIGHTS, AND NOT A CODE OF LAWS.

The Constitution is the supreme law of the land, and cannot be qualified or affected by any legislative act.

The Constitution contains this provision in Article VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The doctrine of the supremacy of constitutional over statute law originated with the adoption of written constitutions, and resulted from the fact that they were definite expressions of fundamental principles, dealing with the form of government and the rights of the people.

Chancellor KENT says:

> "But in this, and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution. The law with us must conform, in the first place, to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void. . . . The constitution is

> the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the constitution, is absolutely null and void.

1 Kent's Commentaries, pp. 448, 449.

See also Cooley, Constitutional Limitations (7th ed.), pp. 5, 6.

Dicey's Law of the Constitution (7th ed.), pp. 140-142.

The subsidiary doctrine, recognized and asserted in this country from the beginning, that the courts may declare any legislative act unconstitutional and therefore void, was also a consequence or corollary of the fact that the written constitutions adopted by the states and the United States in Revolutionary times were the definite and express embodiment of that fundamental law.

The Federalist, No. 78.

Vanhorne's Lessee v. *Dorrance*, 2 Dall. 304.

Marbury v. *Madison*, 1 Cranch, 137.

Note to *Paxton's Case*, Quincy's Rep. 520-530.

Cooley's Constitutional Limitations (7th ed.), c. VII.

Coxe, Judicial Power and Unconst. Legis.

Thayer's Cases on Constitutional Law, pp. 48-154.

Mass. Law Quarterly, vol. II, pp. 441-462.

This theory is admirably stated by Mr. Grinnell in

the article last cited. He expresses the conviction (p. 442) that "the central idea of the American Revolution, and of the establishment of the United States of America and of the Commonwealth of Massachusetts, was *the assertion of a body of principles and plan of government to be applied directly as law against anybody and everybody when occasion should arise, by an impartial, independent court.*"

The case of *Marbury* v. *Madison, supra,* is the first decision of the Supreme Court of the United States in which the doctrine that an act of Congress repugnant to the constitution may be declared by the court to be void was made a ground of decision. Following are passages from the opinion by MARSHALL, C.J. (pp. 176-178):

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
>
> "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> "The government of the United States is of the latter description. The powers of the legislature

are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. . . .

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject."

The Constitution is in its essence permanent and unchangeable, while a law may be altered or repealed at any time. The reason for this is that the Constitution is an embodiment of fundamental principles, and not of ordinary municipal laws, according to the distinction pointed out by Jameson. It was intended to contain rules for the establishment and operation of the federal government and for the preservation of the rights and liberties of the people, and not mere rules of civil conduct.

This characteristic and the reason for it have been expressed in decisions of the Supreme Court as follows:

"The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or

altered only by the authority that made it."

Vanhorne's Lessee v. *Dorrance,* 2 Dall. 304, 308.

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."

Marbury v. *Madison,* 1 Cranch, 137, 176.

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."

Martin v. *Hunter's Lessee,* 1 Wheat. 304, 326.

An amendment to the Constitution under Article V cannot be made without affirmative action by two thirds of both houses of Congress or the legislature of two thirds of the states, and without ratification by the legislatures of three fourths of the several states or by conventions in three fourths thereof.

Thus an amendment to the Constitution is not effected by the will of a majority of the people, but

(while it may be brought about by a powerfully organized political body against the will of a majority of the people) may often fail where the will of the large majority of the people is for a number of years decisively in its favor.

In giving to the Constitution these characteristics of permanency and of supremacy over the laws of Congress it was not the purpose of the Constitution to create a body of super-laws prohibiting acts of individuals and regulating the conduct of the people, which could not be altered or repealed by future legislative action either of Congress or of the several states, or even by a majority of the people of the United States, and thus to abrogate the republican principle of majority rule in all matters of legislation. Its object, as disclosed by the text of the instrument, was to provide a durable framework of federal government, and to secure the rights and liberties of the people as declared in the Bill of Rights.

II.

An Amendment of the Constitution under Article V must, by the Meaning of the Word "Amendment," be a Change Consistent with the Nature and Purpose of the Constitution. The Amending Power is Limited to Changes of That Character.

Meaning of the Word "Amendment."

The word "amendment" means the act of freeing from faults, or, in law, the correcting of an error. It is derived from the Latin words *ex*, out of, and *menda*, fault, defect, or error (Century Dictionary). It implies or presupposes some thing to be amended, for the purpose of remedying some defect. The amendment must be related or germane to the thing.

An amendment to an instrument therefore must be a correction of an error or defect in the instrument. The objects of the amendment and of the original instrument must have some relation to each other. An entirely distinct provision having no such relation may be a modification or repeal, but is not an amendment.

Livermore v. *Waite*, 102 Cal. 113, 118-119:

"The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change *within the lines of the original instrument* as will effect an improvement, or *better carry out the purpose for which it was framed.*"

In re Pennsylvania Telephone Co., 2 Chest. Co. Rep. (Pa.), 129, 131:

"To amend a thing, as defined by Webster, is to change it in any way for the better, to remove what is erroneous, superfluous, faulty and the like; to supply deficiencies, to substitute something else in place of what is removed. The word is synonymous with to amend, correct, reform, rectify. An amendment, therefore, is a change or alteration for the better, a correction of faults or errors, an improvement, a reformation, an emendation. It

necessarily implies something upon which the correction, alteration, improvement or reformation can operate, something to be reformed, corrected, rectified, altered or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended. In respect to the amendment of a charter of incorporation the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify, or alter something in the original charter, it is not, properly speaking, an amendment to that charter."

Gagnon v. *United States*, 193 U.S. 451, 457:

"This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word 'repair' is wholly inapplicable to its subsequent reconstruction. The word 'repair', as the word 'amend', contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise."

Title "Amendment," 2 C.J. 1317.

Such is the law with respect to the amendments of statutes. Amendments must be germane to the subject-matter of the statute specifically amended.

State, ex rel. Gamble, v. *Hubbard,* 148 Ala. 391, 394-397.

McCleary v. *Babcock,* 169 Ind. 228, 233.

Lewis' Sutherland, Statutory Construction (2d ed.), vol. 1, sec. 139.

This principle is recognized in the customary rules providing for amendments of pleadings, which are generally allowed, for the correction of errors, when consistent with the purpose of the original pleading.

Shields v. *Barrow,* 17 How. 130, 144:

"Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. . . . Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. . . .

"To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject."

Hardin v. *Boyd,* 113 U.S. 756.

Lennox v. *Vandalia Coal Co.,* 158 Mo. 473, 488.

The true meaning of the word "amendment" as a correction of defects by a change germane to the thing amended was well understood in the United States when the Constitution was adopted.

The Continental Congress had adopted the following rule on July 8, 1784:

> "No new motion or proposition shall be admitted under color of amendment as a substitute for the motion or proposition under debate until it is postponed or disagreed to."
>
> 5 Hinds' Precedents, secs. 5753, 5767.

This rule denies to any new motion or proposition, on a subject different from that under debate, the quality of an amendment, and prohibits its admission "*under color of amendment.*"

The First Congress under the Constitution, in the Judiciary Act of 1789, adopted a provision for amendment of defects in process or pleadings, in part as follows:

> "Such court [any court of the United States] . . . may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> Act Sept. 24, 1789, c. 20, sec. 32; R.S. sec. 954.

No other kind of amendment is provided for or recognized in the act.

AMENDMENTS OF THE CONSTITUTION UNDER ARTICLE V AND THE POWER OF THE AMENDING AGENCY THEREBY APPOINTED ARE LIMITED BY THE MEANING OF THE WORD "AMENDMENTS" AS THERE USED, AND WERE INTENDED TO BE LIMITED, TO CHANGES IN THE FRAMEWORK OF GOVERNMENT OR BILL OF RIGHTS CONSISTENT WITH NATIONAL REQUIREMENTS. THEY DO NOT EXTEND TO ADDITIONS RESTRICTING THE POLICE POWER OF THE STATES, OR TO MERE LEGISLATIVE ENACTMENTS.

(a) *Limitation of Authority under Article V Defined by Meaning of Word "Amendments."*

The power given by Article V to the amending agency therein appointed is not all-embracing. That agency is not a constitution-making body—the sovereign states or the people. Its authority extends only to the subject-matter of the article—amendments to the Constitution.

The addition of a new provision to the Constitution, it is submitted, is not necessarily an amendment of the Constitution. In order to constitute an amendment it must be within the scope or bear some relation to the object of the original instrument. It must, in other words, be some change in the framework of government created by the original instrument, or some provision better calculated to effect its purpose as declared and shown by the instrument, enlarging or restricting the scope of the powers granted to Congress within the limits of national requirements, changing the provisions with respect to the executive and judicial powers, changing in some way the restrictions on the exercise of powers by the states without, however, infringing upon their right of local self-government, or more ef-

fectively preserving the rights and liberties of the people. It may be even more limited and confined in its scope by the operation of the tenth amendment, so that no change may be made which takes away any of the powers thereby reserved to the states. The assertion of this further limitation, however, is not necessary to this argument.

(*b*) *Contentions of Supporters of Eighteenth Amendment.*

(1) Those who maintain that the eighteenth amendment is a valid constitutional amendment assert that any change in the Constitution may be made, by the proposal and ratification of an amendment in the manner required by Article V, except one depriving a state, without its consent, of its equal suffrage in the Senate. They therefore concede that provisions like the following, if properly adopted, would be valid amendments:

Abolishing property rights.

Abolishing the institution of marriage and the family.

Requiring some particular form of religious worship.

Depriving a state of a part of its territory without its consent (contrary to Article IV, sec. 3, of the Constitution).

Depriving the states of their right to levy taxes.

Restricting the right of the states to manufacture, sell, and transport in local or intrastate commerce tobacco, condiments, meat, drugs, or any other products which three fourths of the several states may at any time deem objectionable.

Forbidding the states to make laws prohibiting miscegenation or regulating any other domestic relation, laws prohibiting the use of child labor or regulating hours of labor, or laws relating to employers' liability and workmen's compensation, for the benefit of their inhabitants.

Prohibiting a republican form of government in the states.

Depriving the states of all their sovereign powers.

Any provision, no matter how inconsistent with the spirit and purpose of our Constitution, no matter how destructive of the rights it guarantees, so long as the equal representation of the states in the Senate is preserved.

Such changes as the above, we say, would not be amendatory, but revolutionary and destructive of the Constitution.

> Curtis's Constitution of the United States, vol. II, pp. 473, 474.

(2) It is contended that the fact that Article V contains two express limitations of the amending power excludes other implied limitations, upon the principle "*Expressio unius est exclusio alterius.*"

The answer to this contention is that the limitations of power, the existence of which it is the purpose of this argument to show, are not implied, but are deduced from a proper construction of the word "amendments" as meaning corrections of errors or defects, and that the inclusion of the express proviso is perfectly consistent with this theory, since, if it had been omitted, changes such as are prohibited would

undoubtedly have been true amendments and therefore within the amending power. If the contention were sound, it would operate to establish the validity of a provision attempting to repeal the whole Constitution, or to strike it out and replace it by something entirely different. Our argument is precisely that such a provision, or any change outside the lines of the Constitution, would not be an amendment.

(3) The argument is also advanced that the fact that in the Constitutional Convention an amendment to Article V was proposed adding a further proviso "that no State shall without its consent be affected in its internal police" shows an intention on the part of the framers of the Constitution that the police power of the states should be subject to amendment.

The proceeding according to Madison's Notes was as follows:

> "Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate . . .
>
> "Mr. Sherman moved according to his idea above expressed to annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'
>
> "Mr. Madison: Begin with these special pro-

visos, and every State will insist on them, for their boundaries, exports, etc."

Farrand, vol. II, pp. 629-631.

The phrase concerning the internal police of the states was subsequently omitted, while the phrase concerning the equal suffrage of the states in the Senate was retained.

The reason for that course of action clearly was because the express proviso was necessary to preserve the equality of representation in the Senate, while there was a manifest objection to including in an excepting clause provisions which could not be amendments of the Constitution, and which therefore it was not necessary to refer to. It was because such provisions were superfluous and because they were likely to be numerous, if stated at all, that the insertion of them in Article V was opposed. That was what Madison meant when he declared: "Begin with these special provisos and every state will insist upon them, for their boundaries, exports, etc." It is certain that the Constitution would never have been adopted if it had been supposed that Article V was intended to authorize the taking away of the police power and the ultimate destruction of the states without their consent.

(c) *The Framers of the Constitution Regarded Article V as Providing for Defects.*

The framers of the Constitution did not hold the view of the supporters of the eighteenth amendment in their interpretation of Article V. If they had intended to authorize the making of any change or addition to the Constitution as an amendment ~~except those~~

~~excluded by the proviso~~, it is safe to say that they would have left the power with the people, instead of conferring it upon representative bodies.

It is interesting to note that in all the reported discussions of Article V, both in the debates in the federal and state conventions and in the Federalist, the provision was said to be made for the correction of errors or defects.

In the Federal Convention the following passages occurred:

> "COL. MASON urged the necessity of such a provision [for amending the Constitution]. The plan now to be formed will certainly be *defective*, as the confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence."
>
> 5 Elliot's Debates, p. 182.

Hamilton said:

> "It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of confederation. It was equally desirable now that an easy mode should be established for supplying *defects* which will probably appear in the new system."
>
> Madison's Notes, Farrand, vol. II, p. 558.

In the convention of North Carolina on the adoption of the Federal Constitution, Iredell said:

"The constitution of any government which cannot be regularly amended when its *defects* are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war. Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system for its own *fallibility,* so that alterations can without difficulty be made, agreeable to the general sense of the people."

3 Elliot's Debates, pp. 176, 177.

In the Federalist Madison said:

"That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the *amendment of errors,* as they may be pointed out by the experience on one side or on the other."

The Federalist, No. 43, sec. 8.

(*d*) *Commentators on the Constitution have Expressed the View that the Purpose of Article V was to Provide a Method of Changing the Framework of Government.*

The two great commentators on the Constitution, Story and George Ticknor Curtis, have expressed the view that the purpose of Article V was to provide a method of changing the fabric or framework of government.

Story says on this subject:

> "It is obvious that no human government can ever be perfect; and that it is impossible to foresee or guard against all the exigencies which may, in different ages, require different *adaptations and modifications of powers* to suit the various necessities of the people . . . It is wise, therefore, in every government, and especially in a republic, to provide means for altering and improving the *fabric of government*, as time and experience or the new phases of human affairs may render proper to promote the happiness and safety of the people."
>
> Story on the Constitution, sec. 1827.

Curtis seems to be the only person who has given serious consideration, in advance of the actual issue, to the question of the extent and limitations of the amending power granted by Article V. He asserts that, while the framework of the government may be changed in some respects, it is not within the amending power to deprive a state of any of the powers reserved by the tenth amendment. He says:

> "It seems to me, therefore, that while it is with-

in the amending power to change the *framework of the government* in some respects, it is not within that power to deprive any state, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution, or which the Constitution did not prohibit it from exercising. In other words, I think the power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three fourths of the states to grasp new power at the expense of any unwilling state. . . . I conclude, therefore, that there are rights of the several states of which they cannot be deprived by an amendment to the Constitution besides their right to equal suffrage in the Senate. We must consider whether a proposed amendment would relate only to the structure of the government, or whether it would relate to some right of the people of a state which was not touched by the original Constitution, and which the states meant to reserve, and did reserve, by the *Ninth* and *Tenth* of the amendments. These amendments have certain clauses as applicable to the amending as to all the other powers embraced in the Constitution. It is quite true that the *amending* power is not a power to be exercised by the government of the United States as that government exercises its powers of legislation. It is specific power, vested as a final authority in three fourths of the states. But when we come to inquire whether three fourths of the states can, by amending the Constitution, deprive

any state of a right of which the Constitution did not deprive it, as it was first adopted, we must, I think, reach the conclusions which I have indicated."

Curtis, Constitutional History of the United States, vol. II, pp. 160-162.

(e) *The Amending Power does not Extend to Additions Restricting the Police Power of the States.*

That deference must be paid to the authority of Curtis's opinion must be conceded. But, even if his view is not adopted, it is clear, we submit, that it is not within the amending power to deprive the states, by provisions directed to that end, of a substantial part of their local police power, which not only was reserved to the states by the tenth amendment, but as a part of their republican form of government was guaranteed to all the states by Article IV, the elimination of which would destroy the states and our system of government.

Hammer v. *Dagenhart*, 247 U.S. 251, 276.
Cooley, Constitutional Limitations (7th ed.), pp. 243, 831.
Miller on the Constitution of the United States, p. 412.

(f) *The Amending Power does not Include the Power of Legislation.*

The power to amend the Constitution does not include the power of legislation. That power was never granted to the amending agency and cannot be exercised by it. This proposition is established by the fact

that all legislative powers contained in the Constitution by Article I are vested in Congress. It is sustained by those cases which hold that resolutions proposing or ratifying amendments need not be submitted to the President or to the governors of the states.

Hollingsworth v. *Virginia*, 3 Dall. 378.
Commonwealth v. *Griest*, 196 Pa. St. 396.
Warfield v. *Vandiver*, 101 Md. 78.

It is supported by the fact that the exercise of such legislative power under Article V, in the shape of irrepealable laws, would be wholly inconsistent with the fundamental principle of majority rule in all matters of legislation, whether in the field of the powers granted to Congress or in the field of the powers reserved to the states. As Mr. Curtis says: "It is quite true that the amending power is not a power to be exercised by the government of the United States as that government exercises its powers of legislation."

(*g*) *Conclusion.*

It is accordingly submitted that no change in the Constitution can be made, under the guise of authority given and exercised under Article V, by the insertion of a provision the primary object and effect of which is to restrain the states in the exercise of their police power, or a provision which is not a fundamental law, but an ordinary municipal law imposing restrictions on the conduct of individuals, which may at the time be abhorrent to the citizens of many states and which cannot be eradicated by future legislation if found by a majority of the people to be contrary to the best interests of the nation.

III.

The Eighteenth Amendment, So Called, is Not a Constitutional Amendment within the Meaning of Article V, and was Beyond the Power of the Amending Agency. It is Invalid, both because it is Ordinary Legislation, and because it Interferes Vitally with the Police Power of the States.

Prohibition of dealing in intoxicating liquors lies entirely within that police power the exercise of which was intended by the framers of the Constitution to be left to the states, and is precisely such a regulation of the conduct of the people of the United States as we have shown to be absent from our Constitution and foreign to its nature and purposes.

The eighteenth amendment, attempting to enforce such prohibition, it is submitted, is not such an amendment as is provided for and authorized by Article V. It is in no respect a change in the framework of the federal government, and bears no relation to the purposes of the Constitution. It has the double vice not only that it is a direct interference with the right of the several states to legislate concerning the health and morals of their people, but also that it is a mere regulation of individual conduct by legislation pure and simple. The proposal and ratification of that so-called amendment by the representative amending body appointed by Article V was an assumption of power entirely beyond the authority conferred upon it by that article.

IV.

Prohibition Amendments in State Constitutions.

The thought naturally occurs that prohibition amendments have been inserted in the constitutions of a number of our states, that apparently no one has questioned their validity, and that, if the argument developed herein is meritorious, it should before now have been applied in suits involving the constitutionality of those amendments.

It seems to be a fact that no such ground has ever been advanced as an objection to any amendment of a state constitution. The reason, however, is not far to seek. It is because the character of state constitutions has changed, and the more modern ones no longer preserve the earlier form of a bill of rights and framework of government, but contain many purely legislative provisions, so that in many instances they have come to resemble a legal code.

This transformation of the character and purpose of state constitutions is well expressed by the Supreme Court of California in the frequently cited case of *Winchester* v. *Howard*, 136 Cal. 432, 439, in the following language:

> "When the Federal constitution and first state constitutions were formed, the idea of a constitution was, that it merely outlined a government, provided for certain departments and some officers and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created. The law-making power was vested wholly in the legislature. Save as to the assurances of individual rights against the

government, the direct operation of the constitution was upon the government only. And such assurances were themselves in part but limitations upon governmental powers.

"Latterly, however, all this has been changed. Through distrust of the legislatures and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character. These are in fact but laws, made directly by the people instead of by the legislature, and they are to be construed and enforced, in all respects, as though they were statutes. . . . In effect, these constitutional provisions are but statutes which the legislature cannot repeal or amend. . . . Recently adopted state constitutions contain extensive codes of laws, intended to operate directly upon the people as statutes do."

See also *State* v. *Hall*, 171 N.W. Rep. (N.D.) 213, 217.

6 Ruling Case Law, sec. 53.

Williams, Constitution and Enabling Act of Oklahoma, preface.

Where a constitution has such a character, serving the purpose not only of a frame of government and bill of rights but also of a body of laws made by the people which the legislature cannot change, an amendment may be valid whatever its nature, so long as it is adopted in the manner provided by the constitution and is not inconsistent with any of the provisions of the Constitution of the United States. The argument advanced herein is clearly not applicable to the amendment of such a constitution.

But the Constitution of the United States is not of that sort. It was not framed for the purpose of controlling the exercise by Congress of governmental powers (not inconsistent with the Bill of Rights) in the field where the federal government was to be supreme and the powers of the states restricted. It was not intended to be a legal code (*M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 407). It was designed to be a frame of federal government and bill of rights, and nothing else. Therefore the argument, although inapplicable to amendments of state constitutions, applies in full force to the amendment under discussion, enhanced even by a just appreciation of the distinction between the two sorts of constitutions.

Another distinction between the more modern state constitutions and the federal Constitution is that the former are much more easily amended. An amendment proposed by the legislature requires only a vote of a majority of the voters of the state for its adoption. In many states constitutional conventions have been held and new constitutions adopted from time to time. In all but a few of the states where prohibition amendments have been adopted there are provisions for amendment of the constitution by initiative petition by the people themselves. The people of the states in limiting the powers of their legislatures have not at the same time unduly restricted their own power to change the laws which they themselves have made.

But the Constitution of the United States is different also in that respect. Being regarded as an expression of the permanent will of the people with respect to their frame of government and their essential rights, it was purposely made very difficult to change. It was

intended to restrict the facility of altering the form of government, but not of making, amending, and repealing ordinary laws. If the Constitution is open to amendment by including what are in effect laws, embodied in it so that they cannot be removed even when a majority of the people favor such removal, then the Constitution may become an instrument by which the will of the people is circumvented. That, in turn, is a serious danger to the Constitution itself.

But perhaps the most important and fundamental distinction relating to this discussion is that in state constitutions amendment is an exercise of sovereign power, which, if the forms are complied with by which the fact that it has been exercised is determined, must be supreme; while by the United States Constitution the amending power is delegated and vested in a representative body, whose authority is restricted by the terms of the grant to the making of amendments pure and simple, and which has no power of legislation.

A tabulation of the prohibition amendments of the different states, which is believed to be accurate, is appended. The first state to adopt such an amendment was Kansas, in 1880. Maine followed in 1884. North Dakota included a prohibition clause in her original constitution in 1889. Oklahoma, being required so to do by the enabling act, made prohibition a part of her original constitution in 1907. The next state to adopt prohibition by constitutional amendment was Arizona, in 1912. All the other prohibition amendments have been adopted since the beginning of the war. None of the original thirteen states is in this list. Only one of them is eastern—Maine—and only three of them are southern—West Virginia, Florida, and Kentucky.

Most of them are western, and they lie chiefly in the middle West. They contain few of the larger cities.

In three states, Iowa, Minnesota, and Missouri, constitutional prohibition amendments recently proposed by their legislatures have been defeated by the people.

V.

The Supreme Court of the United States has the Power and the Duty to Declare this So-Called Amendment Invalid.

Article III, sec. 2, of the Constitution provides as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution. . . ."

Concerning this clause MARSHALL, C.J., says:

> "The judicial power of the United States is extended to all cases arising under the constitution.
>
> "Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> "This is too extravagant to be maintained."
>
> *Marbury* v. *Madison,* 1 Cranch, 137, 178, 179.

There can be no question but that the Supreme Court has the power and authority to examine the Constitution and decide what is and what is not a part of it, and hence to pass on the validity of an amendment. Clearly it is the duty of the court when the question is properly presented to decide whether a provision

claimed to be an amendment is a valid amendment, just as it is the court's duty, in a proper case, to decide whether or not an act of Congress is unconstitutional and void.

M'Culloch v. *Maryland*, 4 Wheat. 316, 400.
Cohens v. *Virginia*, 6 Wheat. 264, 384.

The state courts have frequently held that the question whether a constitutional amendment has been legally adopted is a judicial question.

Koehler & Lange v. *Hill*, 60 Iowa, 543.
Prohibitory-Amendment Cases, 24 Kan. 700.
Edwards v. *Lesueur*, 132 Mo. 410.
Hammond v. *Clark*, 136 Ga. 313.
McConaughy v. *Secretary of State*, 106 Minn. 392, 409.

An interesting authority on the proposition that a court has the power and the duty to decide in what documents and writings a constitution consists is furnished by the recent *Opinion of the Justices* of the Supreme Judicial Court of Massachusetts (Department Reports of Mass., vol. IX, p. 202), holding that a "Rearrangement of the Constitution," submitted to and ratified and adopted by the people of that state, was no part of the constitution. The court held that there could not be at one and the same time two different and separate constitutions, and that either the rearrangement or the old constitution must be the constitution. They were of the opinion that the old constitution still existed, and was not intended to be replaced by the rearrangement. They therefore held

that the rearrangement was not the fundamental law or constitution of Massachusetts.

In just the same way, it is submitted, the Supreme Court of the United States has the power and the duty to declare this so-called eighteenth amendment invalid and no part of the Constitution of the United States.

VI.

This Amendment is Contrary to Every Consideration of Fair Dealing and Public Policy.

Principles of public policy constitute one of the sources of law. Where the decision of a case is not plainly governed by some constitutional provision, statute, or rule of law, and no previous authoritative decision seems to be applicable, such principles should be and doubtless are given consideration by the court.

Ezra R. Thayer in 5 Harv. L. Rev. 172.
John C. Gray in 6 Harv. L. Rev. 28.
21 Harv. L. Rev. 122-125.

The invalidity of the eighteenth amendment, it is submitted, is established by a proper interpretation of the word "amendments" as used in Article V, giving due consideration to the nature and purposes of the Constitution, and a proper construction of the power therein granted to the amending agency. But as this contention is disputed, it is manifestly proper to refer to those principles of public policy which, as we have seen, may, if they do not necessarily, enter into the determination of the case.

The eighteenth amendment was proposed at the instance of sections of the community which were desirous of imposing their ideas of moral and economic

welfare on other sections, not for their own benefit, but in order that the people of such other sections should, by legislation and the compulsion of processes of law, be made to conform to those ideas of welfare, regardless of their own views on the subject.

The legislature of Idaho in 1917 presented a memorial to Congress which is as follows (Idaho Session Laws, 1917, p. 522):

"House Joint Memorial No. 1.

"A Joint Memorial

"To the Honorable, the Senate and House of Representatives of the United States of America, in Congress Assembled:

"Your Memorialists, the House of Representatives and Senate of the State of Idaho, Respectfully Represent, that,

"Whereas: Great economic and moral advance has come to the State of Idaho because of two years of the absolute prohibition of the liquor traffic in the State, and,

"Whereas: We are desirous that the same welfare shall come in all sections of our country, and,

"Whereas: We feel it a duty we owe our country, our neighbor and our God, now, therefore,

"Be it Resolved, That we, the House of Representatives of the State of Idaho, the Senate concurring, do hereby memorialize the Congress of the United States of America, that it provide for a submission to the people of these United States, of a constitutional amendment providing for the absolute abolition of the liquor traffic, both manu-

facture and sale, from every portion of the United States of America."

Through such sentiments as these, assisted by the able financial, political, and legal activities of the Anti-Saloon League and other similar associations, the rural and pastoral portions of the United States have succeeded in imposing their ideas on the populous urban communities, where it is safe to say those ideas have never been accepted by a great majority of the citizens, and, if this eighteenth amendment is valid and effective, have caused a rule of conduct governing the private lives of the people of the United States to be permanently established by constitutional enactment, which is thought by large and respectable classes of the people to be arbitrary, unjust, and an infringement of those personal liberties guaranteed by the Constitution.

This amendment is, moreover, objectionable in its form and the manner of its passage because it was not submitted to the people in those states where a referendum is required by their constitutions, and was ratified by the legislatures of many of the ratifying states before the people could express their approval or disapproval at the polls, and especially because it attempts to bind posterity by prescribing prohibition for all time, allowing Congress no opportunity to exercise its discretion as the needs of the future may seem to require.

If reports are true we may expect before long an attempt by constitutional amendment to enforce national prohibition of the use of tobacco, and conceivably this will be followed by other prohibitions.

By constitutional prohibitions and regulations matters which should be left to local legislation may be removed from the field of legislation for all time. Our Constitution will thus become in part a codification of ineradicable laws, and an instrument dedicated to the cause of human freedom will be turned into an instrument of individual oppression.

In the Virginia Convention debates Patrick Henry forcibly expressed the fear that the government under the constitution proposed by the federal convention, unless restrained by a bill of rights, might disregard the rights and liberties of the people. He said:

> "Excise men may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, everything you eat, drink, and wear. They ought to be restrained within proper bounds."
>
> 3 Elliot's Debates, pp. 448-449.

The Bill of Rights was passed, and his fear became groundless. But now one need only read the Volstead Act to feel renewed apprehension of serious danger to those rights and liberties.

A government or constitution in order to last should have the confidence and support of the people. Marshall said in the Virginia Convention Debates, replying to Henry:

> "The honorable gentleman said that a government should ever depend on the affections of the

people. It must be so. It is the best support it can have. This government merits the confidence of the people, and, I make no doubt, will have it."

3 Elliot's Debates, p. 231.

If this amendment is declared to be valid, a bitterness of feeling against the Constitution and the government will inevitably be created, which will threaten the very existence of the Constitution. The very fact that one fourth of the states through their legislatures can prevent any revision of this amendment will be recognized as a subversion of the Constitution to ends not contemplated by its framers, and will intensify the feeling against it.

It is a maxim that no law can be permanently enforced which is opposed to the view of a majority of the people. It is common knowledge that federal prohibition is bitterly opposed by a majority of the people in many parts of the United States. If this amendment is ultimately held to be valid, the inevitable result will be one of three things:

(1) Defiance of the law, leading possibly to revolution or rebellion.
(2) Non-enforcement or unequal enforcement of the law, bringing the Constitution into contempt and ridicule.
(3) A change in the Constitution, in order to remedy the situation by lawful means.

This proposition is made seriously, and not extravagantly or for rhetorical effect.

The court may take judicial notice of the fact that already a disturbance, popularly known as the "Michi-

gan Rebellion" (fortunately not very serious), has occurred; that in Rhode Island, New Jersey, and Wisconsin the legislatures, ~~claiming authority under section 2 of the eighteenth amendment~~, have passed laws authorizing the sale of beer, contrary to the provisions of the Volstead Act; that in Massachusetts and Vermont, where, under their local option laws, the people have had an opportunity of voting on the license question, they have voted emphatically in favor of license; and that in other states the liquor question has been made a political issue.

The suggestion has met with approval in many quarters that the best solution of the liquor problem will ultimately be found to be in laws permitting the use for beverage purposes of beer and wine, eliminating distilled liquors. But any such law, at least in its application to wine, would undoubtedly be contrary to the prohibition of the eighteenth amendment, and therefore unconstitutional.

If a change is made in the Constitution, what will it be? A repeal of the amendment in the manner now provided by the Constitution seems almost impossible. Doubtless then, first, Article V itself will be amended so that the Constitution may be more readily changed, in order that the will of the people shall not be permanently thwarted by the imposition upon them of laws governing their conduct to which they are opposed. The history of what has happened to the state constitutions shows what kind of amendment that will be. It will be a provision in some form whereby a majority of the people can at any time make an amendment or insert a law in the Constitution. The Constitution, as we have known it, will then be gone, and, in

its place, we shall have two bodies or codes of laws governing the nation—one body composed of laws passed by Congress and the other of superior laws passed directly by the people, but in their nature nothing but statutes and effective only until repealed by the people.

In another aspect, if this amendment is upheld, the barriers protecting and preserving the political independence of the states will be seriously breached, further invasion will be rendered probable, and we shall no longer have that "indestructible Union, composed of indestructible States," which, as the Supreme Court has recently admonished us that we should never forget, was created by our Constitution (*Keller* v. *United States*, 213 U.S. 138, 149).

Amendments of a revolutionary nature, destructive of our government, may be adopted, which the court can hardly, without inconsistency, reject, unless it now establishes the principle that the essential character of the Constitution, as a form of federal government and bill of rights, was fixed when it was framed.

It is submitted that these disastrous results may and should be avoided by holding that this amendment is invalid for the reasons here pointed out.

Respectfully submitted,
ALEXANDER LINCOLN,
MICHAEL J. LYNCH,
Amici Curiae.

Appendix.

PROHIBITION CLAUSES IN STATE CONSTITUTIONS.

State	1st Const.	Last	Amendment	Reference	I. & R
1. *Kansas*	1859	1859	*1880*	Art. XV §10	
2. *Maine*	1819	1819	*1884*	Art. XXVI	Yes
3. *North Dakota*	1889	1889	(Original const.)		
				Art. XX §217	Yes
4. *Oklahoma*	1907	1907	(Original const.)		
				Art. I §7	Yes
				Prohibition Article	
5. *West Virginia*	1872	1872	*1912*	Art. VI §46	
6. *Arizona*	1912	1912	*1914*	Art. XXIII	Yes
7. *Oregon*	1857	1857	*1914*	Art. I §36	Yes
8. *Colorado*	1876	1876	*1914*	Art. XXII	Yes
9. *Idaho*	1890	1890	*1916*	Art. III §26	Yes
10. *Michigan*	1835	1908	*1916*	Art. XVI §2	Yes
11. *Nebraska*	1866	1875	*1916*	Art. XVII §1	Yes
12. *South Dakota*	1889	1889	*1916*	Art. XXIV	Yes
13. *Utah*	1895	1895	*1917*	Art. XXII §3	Yes
14. *Wyoming*	1889	1889	*1917*	Art. XIX §1	
15. *Florida*	1868	1885	*1918*	Art. XIX	
16. *New Mexico*	1912	1912	*1918*	Art. XXIII	Yes
17. *Ohio*	1851	1912	*1918*	Art. XV §9	Yes
18. *Kentucky*	1792	1891	*1919*	Amendment	

Supreme Court of the United States.

October Term 1919

No. 29 Original

STATE OF RHODE ISLAND, COMPLAINANT

vs.

A. MITCHELL PALMER, ATTORNEY GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, DEFENDANTS.

MOTION FOR LEAVE TO FILE BRIEF.

Now comes Aaron A. Ferris, a citizen of the State of Ohio, a Counselor of this Honorable Court, and upon the record in this cause, moves the Court for leave to file a Brief on the merits, as *Amicus Curiae*, in support of the Bill filed by the State of Rhode Island.

In support of his motion for leave to file a Brief on the merits, as *Amicus Curiae*, in aid of the Bill filed by the State of Rhode Island, he states professionally to this Honorable Court:

That he is a Counselor of this Court; that he is a citizen of the State of Ohio; that he has been engaged in the active practice of law in Cincinnati, for more than thirty-five years past; that he is vitally interested as a citizen in the preservation of the representative form of government as established by the framers of the Constitution of the United States; that he believes the so-called Eighteenth Amendment to the Constitution was not proposed by the Congress in accordance with the intent

and meaning of Article V of the Constitution, and is therefore invalid and void, and is violative of Articles Ten and Fourteen of the Amendments to the Constitution, and he believes that the permanence of representative government under the Constitution is involved in the determination by this Honorable Court of the issues made in the record herein.

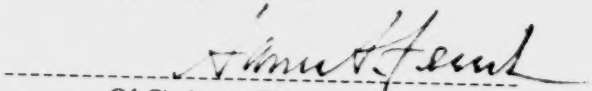
In support of the said Motion, he further represents to the Court that on or about December 11, 1918, in connection with associate Counsel, he filed a Bill in the United States District Court, Southern District of Ohio, at Cincinnati, under the style of the State of Ohio ex rel. Albert G. Erkenbrecher vs. James M. Cox, as Governor of the State of Ohio, to enjoin the said Governor from transmitting to the General Assembly of the State of Ohio thereafter soon to assemble, the then pending proposed Amendment to the Federal Constitution, prohibiting the manufacture, sale and importation of intoxicating liquors as a beverage, the said Bill averring *inter alia*, that said proposed Amendment had not been proposed by the Congress in accordance with the requirements of Article V of the Constitution, was violative specifically of said Article V and of the Amendments Ten and Fourteen of the Constitution, was in no proper sense an Amendment to the Constitution, but was revolutionary in character and effect, and if ratified under the contemplated procedure, would be disruptive of the form of government established by the Constitution. Said bill was dismissed by the Court, one of the grounds for dismissal as stated in the Court's opinion being, that the action had been prematurely brought. For good and sufficient reasons, but not from any lack of confidence in the merits of the issues raised in said Bill, it was deemed inadvisable to carry that cause to a higher Court. Reference is here made to the Bill filed in the United States Court at Cincinnati in part for the purpose of advising this Court that public interest in the questioned constitutionality of the proposed Eighteenth Amendment was actively asserting itself in the State of Ohio at that time. Now, the State of Rhode Island, having brought before the Court, among others, the same issues as those involved in the action brought by said Relator, and for reasons apparent on the reord, the Mover believes it to be fit and proper, and in the public interest, that the public interest asserted in the action in Ohio should be represented in support of the Bill of Complainant now before this Court.

The Mover further represents, that neither himself, nor any of his associates in said action in Ohio, nor said Relator, was, or is in any way identified with any liquor interest whatsoever, but that their action and the action of each of them was solely in the public interest as they viewed it; was to prevent further procedure under and ratification of a proposed Amendment which had been proposed as they believed, in violation of the specific requirements of Article V of the Constitution, and was not in fact or spirit an Amendment to the Constitution, but was revolutionary and disruptive of representative government under the Constitution; and their action was to preserve and perpetuate representative government as contemplated by the framers of the Constitution.

He further states that in asking leave to file such Brief, he believes he speaks and acts not only in behalf of the best interests of the citizenship of Ohio, but in the interest of the public at large.

He represents to the Court that his proposed Brief is in form prepared for printing, and will be filed without unnecessary delay, if his Motion shall be granted.

Respectfully submitted,



Of Cincinnati, Ohio, as *Amicus Curiae*.

March 10, 1920

Office Supreme Court, U. S.
MAR 31 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term, 1919

No. 29 Original

STATE OF RHODE ISLAND, *Complainant,*

vs.

A. MITCHELL PALMER, ATTORNEY GENERAL, and DANIEL C. ROPER, Commissioner of Internal Revenue, *Defendants.*

BRIEF IN THE PUBLIC INTEREST AND IN SUPPORT OF COMPLAINANT'S BILL.

By AARON A. FERRIS, Cincinnati, Ohio,
as *Amicus Curiae.*

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Supreme Court of the United States.

October Term, 1919.

No. 29 Original.

STATE OF RHODE ISLAND, COMPLAINANT,

vs.

A. MITCHELL PALMER, ATTORNEY-GENERAL, and DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, Defendants.

BRIEF ON BEHALF OF COMPLAINANT

BY

AARON A. FERRIS, of Cincinnati, Ohio, as *Amicus Curiae*.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

WHAT IS AT STAKE?

Counsel approaches the argument of the case now before the Court, with the profound conviction that the decision of the Court may determine the question as to the continuance of a representative form of government, as that form of government was intended and framed by the authors of the Constitution.

The Court's decision may mark the parting of the ways between a government stabilized under a written Constitution, which has brought peace and prosperity to a law-abiding people for a century and a third; and a government by experiment under the leadership of theo-

rists and Utopian dreams, and that growing class of disturbers of the peace who would paralyze and destroy individuality and independence by bringing the entire citizenship down to a common level, resulting in paternalism and anarchy.

The Court will, no doubt, take judicial notice of the alarming unrest that prevails throughout the world, and in particular of the unrest in the United States, directly traceable in part to the Eighteenth Amendment, with litigation developing throughout the land; labor disturbances threatening the peace and comfort of the population; movements already under way further to change our form of government by proposing amendments to the Constitution to abolish the use of tobacco, and to elect the President and Judges of the United States Courts by popular vote.

THE PARAMOUNT ISSUE.

The Congress in December, 1917, with a voting membership of ninety-five in the Senate, and four hundred and thirty-four members in the House, by a vote of forty-seven for the measure in the Senate—strictly speaking by a vote of less than a majority of that body; and in the House by a vote considerably less than two-thirds of the membership, undertook to propose an Amendment to the Federal Constitution and by national edict, prohibit perpetually the manufacture, sale, and importation of intoxicating liquors as a beverage in the United States.

It is contended in the Bill of Complaint, that the so-called Eighteenth Amendment to the Constitution was not proposed by the Congress in accordance with the requirements of Article V of the Constitution; contravanes Articles Ten and Fourteen of the Amendments; that the proposed Amendment is in no proper sense an Amendment to the Constitution; but instead, is revolutionary in effect and if allowed to stand as a part of the funda-

mental law, would disrupt and overturn the system of representative government established by the Constitution. The paramount issue before the Court is to determine whether or not the proposed Eighteenth Amendment shall be declared to be a valid part of the organic law of the United States.

At the beginning of the argument, as emphasizing the importance of the case counsel can not do better than to ask the Court's attention to the opinion of this Court in McCulloch vs. The State of Maryland, 4 Wheat. 316, involving the power of Congress to incorporate the Bank of the United States, and whether Maryland, without violating the Constitution, could tax a branch of that bank, where Chief Justice Marshall, in delivering the Opinion, in the opening paragraph, at page 400, uses this impressive language:

> "The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our Country devolved this important duty." * * *

The decision in this case was after two or three Acts of Congress had established a Banking System and the principle of the plan had been bitterly contested in Con-

gress; the system had been in use and then lapsed; and the point was made on behalf of the Government that Congressional action should be decisive; and the Chief Justice continued:

> "It will not be denied that a bold and daring assumption might be resisted, after an acquiescence still longer and more complete than this. BUT IT IS CONCEIVED THAT A DOUBTFUL QUESTION, ONE ON WHICH REASON MAY PAUSE, AND THE HUMAN JUDGMENT BE SUSPENDED, IN THE DECISION OF WHICH THE GREAT PRINCIPLES OF LIBERTY ARE NOT CONCERNED, BUT THE RESPECTIVE POWERS OF THOSE WHO ARE EQUALLY THE REPRESENTATIVES OF THE PEOPLE, ARE TO BE ADJUSTED; IF NOT PUT AT REST BY THE PRACTICE OF THE GOVERNMENT, OUGHT TO RECEIVE A CONSIDERABLE IMPRESSION FROM THAT PRACTICE. AN EXPOSITION OF THE CONSTITUTION DELIBERATELY ESTABLISHED BY LEGISLATIVE ACTS, ON THE FAITH OF WHICH AN IMMENSE PROPERTY HAS BEEN ADVANCED, OUGHT NOT TO BE LIGHTLY DISREGARDED." * * *

The Chief Justice continues:

> "The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the Executive Cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and intelligent as the Country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government; convinced

those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance.

"These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution."

In striking contrast with the methods used for enacting the Bank Act, referred to by the Chief Justice in the paragraph quoted, where the measure had been before Congress on several different occasions and acted upon by the people through different periods; when the plan "did not steal upon an unsuspecting legislature and pass unobserved," but was bitterly and repeatedly contested "with as much persevering talent as any measure has ever experienced," and had "convinced those who were most prejudiced against the measure of its necessity,"—were the methods of those who railroaded through the proposal for the Eighteenth Amendment, and when, according to common knowledge, intimidation bordering upon blackmail, threats of defeat at the polls of Senators and Representatives, were resorted to by certain advocates of the revolutionary proceedings, and then stampeding through several of the legislatures, while the Nation was at War, ratification of the proposed Amendment.

ARTICLE V OF THE CONSTITUTION.

The case before the Court, as we view it, involves primarily the interpretation and construction of Article Five of the Constitution,—a question now for the first time squarely brought before the Court on a direct issue.

Article V stands alone among the Seven Original Articles, without any subdivision or paragraphing; and

omitting the clauses relating to the importation of slaves, a capitation tax, and equal suffrage in the Senate, reads:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to the Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or other mode of ratification may be proposed by Congress."

What does the Article mean when it says "*the Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to the Constitution?*" The language is not ambiguous. It says "both Houses," not a *majority, not two-thirds of a House, not two-thirds of those present.* We have in the Constitution itself the definition of a House. In Article I, we find the definition. Section One, paragraph 1, reads:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
>
> "Section II. *The House of Representatives shall be composed of members* chosen every second year by the people of the several states."
>
> "Section III. *The Senate of the United States shall be composed of two senators from each State,* chosen by the legislature thereof, for six years; and each Senator shall have one vote."

Here then, we submit, is a definition of "both Houses." The House of Representatives is composed of *members;* and the Senate is composed of *two Senators from each State.* We believe it to be an unanswerable proposition to assert that when the term "two-thirds of both Houses"

is used in the Article, it means two-thirds of the *members* of the House of Representatives, and *two-thirds* of those "composing" the Senate. If the Court were called upon to determine the meaning of the words, "both Houses," apart from any other Article, Section or Paragraph of the Constitution, it could not escape, as we think, from holding that when the word "Houses" is used, it means the *whole* House, not a fractional part of it.

HISTORY AND AUTHORITIES SUPPORT COMPLAINANT'S CLAIM.

Assuming that there is no doubt as to what the framers of the Constitution meant, when they agreed upon Article Five, providing for Amendments to the Organic Law, it is a familiar principle that in construing statute or constitutional provisions, the Court looks to the history of the times when the Constitution or law was made, and into the proceedings of those framing the Organic Law, or an Act of the Legislature.

In State of Rhode Island vs. The State of Massachusetts, 12 Peters, 657, an action for the settlement of the boundary lines between the two states, Mr. Justice Baldwin, delivering the Opinion said:

> "In the Construction of the Constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy."

In Prigg vs. The Commonwealth of Pennsylvania, 16 Peters 539, involving the validity of a statute of Pennsylvania, which forbade the taking by force of any Negro with intent of selling such Negro into slavery, Mr. Justice Story, delivering the Opinion says on the point of interpreting the Constitution:

"And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Under these rulings and practice, we go back to original and contemporaneous history.

THE ARTICLES OF CONFEDERATION.

It is a matter of History that the Articles of Confederation were unwieldy, fragmental, and altogether inadequate for the purposes of a National Government; they were a rope of sand, and there was danger of the failure of a Republican form of government. Hence, a Convention of the States was called, not to *amend* the Articles, but to create a new and substantial government.

Thirteen States composed the Union, under the Confederation. The Articles of Confederation provided for their Amendment in the manner set forth in Article XIII which provided:

> "And the articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the Legislature of every State."

Here then was a mischief to be corrected, and a remedy to be applied. Article V of the present Constitution provides the remedy, and method of amendment.

Can it be reasonably contended, that in avoiding Scylla, the framers of the Constitution intended to provide an easy method for running upon Charybdis; and permit an amendment to the Organic Law, by allowing two-

thirds of a quorum of each House, a majority being present, to propose an Amendment to the Constitution?

In Marbury vs. Madison, 1 Cranch 137, Chief Justice Marshall, delivering the Opinion, at page 176, says:

> "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be controverted, that the Constitution controls any legislative act repugnant to it, or, *that the legislature may alter the Constitution by an ordinary act.*
>
> Between these alternatives there is no middle ground. *The Constitution is either a supreme paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.*
>
> *If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.*"

Further on in the Opinion, the Chief Justice says:

> "That the people have an original right to establish, for their future government such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. *The exercise of the original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.*"
>
> "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.
>
> "The government of the United States is of the

latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?''

In Hollingsworth vs. Virginia, 3 Dallas 378, 381, the Eleventh Amendment being under consideration, Mr. Justice Chase, delivering the Opinion, it was argued that *an Amendment is a substantive act, unconnected with ordinary legislation.*

In United States vs. Ballin, 144 U. S. 1-11, the validity of an Act of Congress being under consideration, Mr. Justice Brewer delivering the Opinion, it is held:

The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore Constitutional restraints or violate fundamental rights.

WHAT WRITERS ON CONSTITUTIONAL LAW SAY ON THE SUBJECT.

In ''Story on the Constitution,'' that author in treating of Article V of the Constitution says at Section 1827:

> ''A government forever changing and changeable, is indeed, in a state bordering upon anarchy and confusion. A government which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while become wholly unsuited to the circumstances of the Nation; and it will either degenerate into a despotism or, by the pressure of its inequalities, bring on a revolution. * * * *The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation and caution; and to follow experience, rather than to open a way for experiments suggested by mere speculation or theory.''*

At Sec. 1828, Judge Story, in speaking of the framers of the Constitution, says:

> *"They knew the besetting sin of republics is a restlessness of temperament and a spirit of discontent at slight evils."*

Judge Story, on this subject, cites No. 43 of the Federalist, wherein James Madison, who, with Alexander Hamilton and other framers were explaining the Constitution and laboring for its ratification, has this to say:

> "That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It moreover equally enables the general and state governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exceptions must have been admitted on the same consideration which produced the privilege defended by it."

In Elliott's Debates there was no definition anywhere, so far as we have discovered, defining what the term "two thirds" meant. But it is instructive to quote what Alexander Hamilton said on the subject of Amendments. At page 431, Vol. V, he says:

> "It had been wished by many, and was much to have been desired, that an easier mode of introducing

amendments had been provided by Articles of the Confederation. It is equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, but will be most sensible to the necessity of amendments; and also to be empowered, *whenever two thirds of each branch should concur, to call a Convention.* There could be no danger in giving this power, as the people will finally decide in the case."

Hamilton evidently contemplated the entire membership of each House.

It is important to note that throughout the Debates, the members of the Convention seem to have considered the proposal of Amendments only through the method of calling Conventions; and those statesmen did not appear to contemplate that Congress would propose amendments except on the call of two thirds of the States to hold a Convention.

Judge Story cites Madison, who was discussing the subject of amendment, as saying that "useful alterations will be suggested by experience;" that the plan, under Article V would guard against "that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." He speaks of the provision for enabling the general and State governments "to originate the amendment of errors." But nowhere do we find any discussion as to the possibility of changing the form of government under the guise of an amendment.

"Putney on Constitutional Law," in the Chapter on amendments, at page 489, says:

"The object of the framers of the Constitution was to make such provision on this point, as would make it sufficiently difficult to amend the Constitution to give stability to that instrument; but on the other hand, not so difficult as to prevent such amendments as were found to be necessary by a large majority of people."

"STATUTES IN DEROGATION OF COMMON RIGHT TO BE STRICTLY CONTRUED."

This familiar maxim calls for no citation of authorities. Much more then should the maxim apply to the construction of an Article of the Constitution, when a proposed Amendment of the Constitution derogates from the common right.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

Counsel respectfully submits that Article I, which prescribes the rules for the passing of Bills, Resolutions and Orders, which Bills, Resolutions and Orders, are in a sense ephemeral in character, and can readily be amended or altered, and which are the real "business" of the Congress, furnish inherent evidence that the ordinary "business of Congress is not to *amend* the Constitution; and the maxim *"Expressio Unius Est Exclusio Alterius"* is applicable.

Expressed in another form, the enactment of Laws and the passage of Resolutions—the main business of Congress, have no application to the method of amending the Constitution.

The only articles which can throw any light on the question, and which define numbers, aside from Article V, are Article I, relating to "The Legislature," and Article II, relating to the Executive, and possibly Article VI. First we quote from Article I:

Section 3. Par. 6. The Senate shall have the sole power to try all impeachments. * * * When the

President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of *two-thirds of the members present.*

Sec. 5. Each House shall be the judge of the elections, returns and qualifications of its own members, *and a majority of each shall constitute a quorum to do business;* but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Par. 2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and *with the concurrence of two-thirds,* expel a member.

Par. 3. Each House shall keep a journal of its proceedings, and from time to time publish the same; * * * and the yeas and nays of the members of either House, on any question shall, *at the desire of one-fifth of those present,* be entered on the journal.

Sec. VII. Par. 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, *two-thirds of that House* shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved *by two-thirds* of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for and against the Bill shall be entered on the journal of each House respectively.

Par. 3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of

adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by *two-thirds of the Senate and House of Representatives,* according to the rules and limitations prescribed in the case of a bill.

Article II, Sec. 2, Par. 2, reads: He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, *provided two-thirds of the Senators present concur;* and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law.

It will be noted that the term "two-thirds" is used first in Paragraph 6 of Section 3, where it declares that no person can be convicted under impeachment charges *without the concurrence of two-thirds of the members present.* In Section 5, it is declared that *a majority of each (House) shall constitute a quorum to do business, but a smaller number may adjourn from day to day.* Paragraph 2, Section 5, provides that each House may expel a member with the concurrence of *two-thirds* of that House. Paragraph 3 of the same Section provides that the yeas and nays on any question in either House may be had *at the desire of one-fifth of those present.* In Section VII of Paragraph 2, the same Article, which relates to the requirements in the passing of bills, the term *"Two-thirds" of that House* appears not less than three times. All of these qualifications as to numbers required on any subject, occur in Article I, which defines the composition of the two Houses of Congress and their functions.

In Article II, relating to the powers of the President, as above quoted, it is declared that he shall have power, by and with the advice of the Senate, to make treaties, *provided two-thirds of the Senators present concur.*

In Paragraph 6 of Section 3, Article I, it is declared that no person shall be convicted under impeachment proceedings *without the concurrence of two-thirds of the members present.*

Again, in Paragraph 3, Section V, of the same Article, the yeas and nays of the members of either House must be required at the desire of *one-fifth* of those present.

Still further, in Article II, Section 2, Paragraph 2, the President is given power to make treaties, *provided two-thirds of the Senators present concur.* In these instances alone do we find specific definitions and limitations as to what *numbers* may or may not do.

Article VI, "Miscellaneous," Paragraph 3, provides that "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation." Under the Paragraph of Section Five, Article I, which declares that "each House shall be the judge of the elections, returns, *and qualifications of its own members, and a majority of each House shall constitute a quorum to do business,*" would it be contended that either House could adopt a Rule by which only a *majority,* or two-thirds of those present should be required to take the oath or affirmation? To ask the question is to answer in the negative. Yet taking an oath or affirmation is part of the "business" of each House. And it would seem that the Senators and Representatives, by Resolution, could limit the number of those required to take the oath or affirmation, to a *majority* or *two-thirds* of the Senators and Representatives, and so *amend* Article VI, with as much reason as they could propose an Amendment under Article V, by a vote of *two-thirds of those present,* a quorum being present.

In neither one of these provisions involving the number of votes required in any given instance, such as the

trial of impeachments; judging as to the qualifications of members; punishing members for disorderly behavior; calling for the yeas and nays on any question; passing a bill over the President's veto; submitting a resolution or order to the President for his approval; or as to the advice and consent of the Senate in the making of treaties or the nomination of ambassadors and other officials,— was any vital, constitutional principle or the permanence of representative government, in any essential particular, involved. They were and are only rules for the transaction of ordinary, routine business.

Counsel is justified in asserting, that the *intent* of the framers of the Constitution, was to distinguish between the methods of transacting the general business of the Congress, under Article I, and the extraordinary and unusual plan of proposing Amendments to the Constitution, under Article V.

WHAT IS AN AMENDMENT TO THE CONSTITUTION, AS CONTEMPLATED UNDER ARTICLE V?

As to the First Ten Amendments, proposed at the first session of the first Congress in 1789, it may be observed that all ten of the Amendments, were, for all practical purposes parts of the original Constitution. They were and are in their essence, and have been defined as a Bill of Rights, specifying in detail some essentials which many of the framers of the Constitution believed should have been incorporated in the body of the main document. They were interpretative of the general principles declared in the Constitution, rather than Amendments to that instrument. And it is an historical fact that several at least, of the States taking part in the framing of the Constitution, made it a condition precedent to ratification of the Constitution, that the Amendments should be ratified and so made a part in effect of the original Constitution. We ask the Court's attention to these ten amendments in support of this contention:

Article I, provides that Congress shall make no law respecting an establishment of religion, abridging the freedom of speech, or the right of the people to petition for a redress of grievances:

Article II, provides for a well regulated militia as necessary to the security of a free state.

Article III, that no soldier in time of peace shall be quartered in any house without the owner's consent; nor in time of war except in a manner prescribed by law:

Article IV, secures the people against unreasonable searches and seizure; and that no warrant should issue except on probable cause supported under oath:

Article V, that no person should be held to answer for a capital or infamous crime, except upon indictment by a grand jury, except in cases arising under war conditions; that no person should be twice put in jeopardy of life or limb; be compelled in any criminal case to be a witness against himself; be deprived of life, liberty or property without due process of law, and that private property should not be taken for public use without just compensation:

Article VI, providing for the speedy and public trial by jury of the accused, who must be confronted with the witnesses against him; and who should have compulsory process for witnesses in his favor and have the assistance of counsel for his defense:

Article VII, That the right of trial by jury in actions at law when the value in controversy exceeds twenty dollars should be preserved, and that the rules of the Common law should obtain in the re-

examination of such cases in all courts of the United States:

Article VIII, That excessive bail should not be required, and that excessive fines should not be imposed, nor cruel or unusual punishment inflicted:

Article IX, That the enumeration of the Constitution of certain rights, should not be construed to deny or disparage other rights retained by the people:

Article X, That "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Surely it can not be contended that any one of these ten Amendments departs in any particular from, or adds to or alters in any material manner, word or phrase, the *meaning* or *principle* either of the Preamble, or the Seven original Articles of the Constitution. Do they *amend,* alter or add to the Preamble? No. Do they *amend,* alter or add to Article I, relating to the Legislative functions and powers? No. Do they *amend,* add to or alter Article II, relating to the Executive office and functions? No. Do they *amend,* add to or alter Article III, relating to the Judicial department of Government? No. The same question and answer may be applied to Articles IV, V, VI, and VII, of the original immortal document. Strictly speaking, they are not "Amendments." A better term would be "Interpretations."

Article XI of the Amendments is directly traceable to Section Two, Article III of the Constitution, and is definitive of and a limitation upon suits at law or in equity brought by citizens of another state or subjects of a foreign state against the United States, rather than an *amendment* to the original Article.

Article XII of the Amendments is in no reasonable intendment an amendment by alteration of, or addition

to, the original Constitution. It is rather a change in phraseology of Paragraph 2 of Section One of Article II, providing for the Election of the President and Vice-president through the Electoral College.

After a hiatus of sixty-one years from the adoption of Article XII of the Amendments, ratified in 1804, we come to Article XIII of the Amendments which abolished slavery in the United States, and was ratified in 1865. The existence of slavery in the United States was recognized in the Constitution, both in Article I and in Article V. In Article V it was provided that "no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article."

As to the Thirteenth, Fourteenth and Fifteenth Amendments, the Supreme Court in what is known as the Slaughter House Cases (16 Wall 36), Mr. Justice Miller delivering the opinion *held* that "the main purpose" of those amendments, "Was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the White race, who had formerly held them in slavery."

Certainly there was no departure in any one of the three amendments, from the Preamble, or any of the Articles of the Original Constitution.

The Sixteenth Amendment provides for an Income Tax. Article I, Section Eight of the Constitution, contains ample authority for the imposition of an income tax. It is a trueism to declare that any Sovereign State has power to raise revenues sufficient to carry on its government.

The Seventeenth Amendment authorizes the election of the United States Senators by popular vote, instead of by the respective legislatures. It changes in no sense the functions of the Senators or their number. The principle of representation by the States, as States, remains.

THE EIGHTEENTH AMENDMENT.

But when we arrive at the Eighteenth Amendment, prohibiting the manufacture, sale and importation of intoxicating liquors as a beverage, and providing for "concurrent" legislation by the several states to enforce its provisions, here is an "amendment" which is revolutionary, and a radical departure from every principle involved in the Constitution, both in spirit and letter, from the Preamble down through the Several Articles, including the Seventeen Amendments. It is distinctly paternalistic. It repudiates the fundamental principle declared in the Preamble, which declares that "We, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILLITY, PROVIDE FOR THE COMMON DEFENCE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION."

It departs from the principle established by uniform decision of this Court, to the effect that police powers and regulations belong to the several States. It seeks to regulate the habits of every individual citizen of the United States. If it is to determine what an individual citizen may drink; it also declares for the principle that the National Government may say what kind of food he may eat; what pattern of clothes he shall wear; and what church he must attend.

It annuls, at a single stroke, Article Ten of the Amendments—one of the conditions precedent to the adoption of the Constitution, which provides: *"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

It would embark the people of the United States upon

a ship undertaking the experiment of navigating an unknown and uncharted sea, without rudder or compass. It would open the door to fanatics, and dreamers, and radicals, and visionaries, who would contend that they could point the way to Paradise through legislative enactment. It would make possible government by a minority rather than a majority.

It is not, in any proper sense, an amendment to the Constitution. It would establish another and different form of government from that under which we have lived and prospered as a nation for one hundred and thirty-three years.

What Article, Section or Paragraph of the Original Seven Articles or of any one of the Seventeen Amendments, can the Eighteenth Amendment be said to *amend, alter or modify?* The answer must be, that it is not related in principle to any one of them. It proclaims a different and entirely new system of government.

AMENDMENT DEFINED.

In respect to parliamentary procedure, the term *amend* is specifically defined by Webster as: "To alter (as a bill or resolution) formally by some addition, taking away, or modification; as to *amend* an appropriation bill. The changes that may be made in *amending* a bill or resolution are practically limited only to those that do not bring in a subject different from the original."

NO NECESSITY FOR THE AMENDMENT SHOWN.

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to the Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments."—So reads Article V.

Here then are provided *two* methods for amending the Constitution. The first arises when *two-thirds* of both

Houses shall deem it necessary. In making use of the words—"shall deem it necessary," did the framers of the Constitution have any purpose in mind in using those words? Why did they not simply say: "*Whenever two-thirds of both Houses take the notion, the Congress shall propose amendments*" etc.? When we consider the character and master minds of those framing the Constitution, there is no escape from the conclusion that the words as used were used with a purpose. The wording forbids the inference that both Houses could propose an amendment on any day in the week and require action thereon, without some preliminary moving cause. There must be a *necessity* for the proposal. No popular clamor, no fanatical insistence, no revolutionary uprising would justify the proposal radically to change the form of government by means of a so-called amendment. The limitation of *necessity* for a change, is what the founders intended, and declared in no uncertain terms.

Yet the Congress in proposing the Eighteenth Amendment gave no indication of any "necessity" moving therefor. The Joint Resolution is silent on the subject of *necessity* or any cause for change in the organic law, but under the simple formula recites:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following amendment to the Constitution be, and hereby is, proposed to the States to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution."

Under this formula, and without any expression or intimation of *necessity,* the proposal is made to change fundamentally the Constitution. The Resolution does not recite that the proposal was made by *two-thirds of those present, a quorum being present,* but reads: "Two-thirds of each House concurring therein," which is not in accordance with the actual vote shown by the record.

Again, the same clause in Article V put the Congress on inquiry as to the question of *necessity,* when the other method of amending the Constitution is set forth, where it is provided: "Or, on the application of the legislatures of two-thirds of the several States," the Congress shall propose amendments to the Constitution. On the authority of The Federalist, amendment of the Constitution by a convention called on the application of the legislatures of two-thirds of the several States, was the method plainly contemplated. When the Prohibition proposal was made, forty-eight States composed the Union. Thirty-two States through their legislatures could have applied to Congress to call a convention for proposing amendments. Was there an application by any of the forty-eight States, through its legislature, to call a convention for such purpose? Not one such application. Therefore there was ample notice to Congress that not one of the forty-eight States was urging through its legislature for any such amendment. Hence there was positive evidence, though negative in form, that there was no *necessity,* pressing or otherwise, calling for such a radical change in our form of government.

And when it comes to proposing an Amendment to the Constitution by a vote in each House, of two-thirds of those present, a quorum being present, the claim for such a standard is staggering in its contemplation.

If our present form of government is to be changed, such change should be made through a Convention called on the demand of the people, through delegates chosen from the several States, as was done when the Articles of Confederation gave place to the present Constitution.

HISTORY OF THE CONSTITUTIONAL AMENDMENTS.

There has been no uniform rule in the proposal of Amendments to the Constitution. In some cases, the proposal has received a vote of *more* than two-thirds of

the *membership* of each House, and in others *less*. So that no argument can be predicated along that line, for or against the claim as to membership. The first Ten Amendments to the Constitution were proposed at the first session of the First Congress which met in 1789, as before stated. It appears, from the best evidence obtainable, that the proposal of those Amendments was made in secret session, and hence it has not been possible to discover the actual vote by yeas and nays, either in the Senate or House on the proposal of the first Ten Amendments.

The history of the subsequent amendments is shown in the following synopsis:

11th Amendment (Federal Judicial Power). Passed Mch., 1794.

Senate composed of 34 members—House 113.
Votes for in Senate 23 to 2=one less than 2/3 membership.
Vote in House—81 to 9=*five more* than 2/3 of House.

12th Amendment (Reform in matter of Electoral Vote) —Passed Dec. 1803.

Senate composed of 41 members—House 114.
Vote for in Senate 22 to 10=6 *less* than 2/3 of membership.
Vote in House 83 to 42=7 *more* than 2/3 of House.

13th Amendment (Prohibiting Slavery). Passed Feb. /65.

Senate composed of 56 members—House 173.
Vote in Senate 38 to 6=just 2/3 of Senate.
Vote in House 112 to 57—4 *less* than 2/3 House.

14th Amendment (Making Negroes Citizens). Passed June /66.
Senate composed of 56 members—House 173.
Vote in Senate 33 to 11=5 *less* than 2/3.
Vote in House—120 to 32=4 *more* than 2/3.

15th Amendment (Prohibiting Color Restrictions). Passed Feb. /69.
Senate composed of 56 members—House 173.
Vote in Senate 39 to 13=*one more* than 2/3.
Vote in House 145 to 44=29 *more* than 2/3.

16th Amendment (Income Tax). Passed July 1909.
Senate composed of 92 members—House 391.
Vote in Senate 77 to 0=15 *more* than 2/3.
Vote in House 318 to 14=56 *more* than 2/3.

17th Amendment (Popular Election of Senators). Passed May 1912.
Senate composed of 94 members—House 429.
Vote in Senate 64 to 24=2/3 of membership.
Vote in House 238 to 39=48 *less* than 2/3 membership.

18th Amendment (National Prohibition). Passed Dec. 18, 1917.
Senate composed of 95 members, one vacancy—House 434.
Vote in Senate 47 for=15 *less* than 2/3 of membership.
Vote in House 282 for=7 *less* than 2/3 membership.

With such a record before us, it does not seem possible that this Court should place very great stress on Hinds' Precedents or on the ruling of the late Speaker Reed, when it comes to the question of determining the meaning of a crucial part of the Constitution, and changing the form of government.

THE EIGHTEENTH AMENDMENT WOULD NULLIFY ARTICLE TEN OF THE AMENDMENTS; AND TRANSFER POLICE POWERS FROM THE STATES TO THE GENERAL GOVERNMENT.

Article X of the Amendment declares:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

By an unbroken line of decisions of this Court, it has been held that police powers and regulations belong exclusively to the States.

In Martin vs. Hunter, 1 Wheat. 304, an action where Virginia refused to obey a mandate of the Supreme Court, Mr. Justice Story delivering the Opinion, at page 324, says:

> "The Constitution of the United States was ordained and established, not by the States in their sovereign capacity, but emphatically, as the preamble of the Constitution declares, that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers, which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the states depend upon their own constitutions, and the people of every state had the right to modify

and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the general government of the United States.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the Articles in Amendment of the Constitution, which declares that 'the Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

To a similar effect, Gibbons vs. Ogdon, 9 Wheat. 203. In the License Cases Thurlow vs. Massachusetts, et als., 5 How. 304, involving the License Laws of Massachusetts, Rhode Island and New Hampshire, for the sale of spirituous liquors, Chief Justice Taney delivering the Opinion, at page 574, says:

> "It is equally clear, that the Power of Congress over this subject does not extend further than the regulations of Commerce with foreign nations and among the several states; and that beyond these limits the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well being of its citizens. I am not aware that these principles have ever been questioned."

In United States vs. DeWitt, 9 Wall. 41, it is held, Chief Justice Chase delivering the Opinion, that "Congress has no power under the Constitution to prohibit trade within the limits of a state."

What is known as the "Slaughter House Cases,"

The Butchers' Benevolent Association of New Orleans, 16 Wall. 36, Mr. Justice Miller delivering the Opinion, supports the proposition.

In Barbier vs. Connolly, 113 U. S. 27, it is held, Mr. Justice Field delivering the Opinion, that an ordinance of the city of San Francisco "prohibiting the carrying on of public laundries and wash houses within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning, is purely a police regulation within the competency of any municipality, possessed of the ordinary powers, to make," and that "A Federal tribunal can not supervise such regulations."

Mugler vs. State of Kansas, 123 U. S. 623.

FALLACIOUS ARGUMENTS.

It has been argued that the *practice* of the Congress and State Legislatures in the passing of Bills and Resolutions had become controlling in the interpretation and construction of Constitutional provisions. The unsoundness of such a line of argument becomes at once apparent when it is considered that the Judicial branch of the Federal Government is charged with the duty of determining whether an Act of Congress or a Resolution of that body, or an Act of a legislature, has been enacted in accordance with the provisions of the Constitution.

Let us examine some of the points advanced.

It has been argued that under Article I, Section 5, of the Constitution, which provides that "Each House may determine the rules of its proceedings," the Senate, more than a half century ago, passed a resolution to the effect "that the expression 'two-thirds of that House' meant two-thirds of a quorum and this has been the rule which that body has followed." It is cited that Senator Mason in 1856 raised the question whether an affirmative vote of two-thirds of the members composing the Senate was required to pass a certain Bill over a veto. The Presi-

dent, *pro tempore*, decided that only an affirmative vote of two-thirds of the Senators present was required; and on approval the ruling was sustained.

Senator Trumbull it is argued, while a member of the Senate, raised the question, whether a joint resolution proposing an amendment to the Constitution did not require an affirmative vote of two-thirds of all the members of that body; and the presiding officer ruled that it required a vote of only two-thirds of the Senators present, and on approval the ruling was sustained.

Hinds' Precedents are brought forward to sustain the proposition that a vote of two-thirds of those present is all sufficient in passing a bill over the President's veto.

Speaker Reed's ruling is quoted when the joint resolution proposing an amendment to the Constitution providing for the election of Senators by popular vote was before the House; and Mr. Reed observes:

> "The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds' of both Houses! What constitutes a house? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a house to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted, and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what states are present and represented, or what states are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the States directly, and they pass upon it.
>
> The first Congress, I think, had about 65 members

> and the first amendment that was proposed to the Constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our government and disposed of in that way."

In support of this line of argument to the effect that the "practice" of some Legislatures and State Courts in construing the meaning of "two-thirds of each House," the case of the State vs. McBride 4. Mo. 303, has been referred to.

The Missouri case was a proceeding in *Quo Warranto,* requiring the defendant to show by what authority he exercised the office of Circuit Judge. It is instructive to note that in that case, where the question involved was whether an amendment to the Constitution of the State had been properly adopted the Court say:

> "In the 12th Article of our Constitution it is provided that the General Assembly may, at any time, propose such amendments to the Constitution as two-thirds of each house shall deem expedient;—which shall be published in the newspapers of this State, three several times, at least twelve months before the next general election; and if at the first session of the General Assembly after such general election, two-thirds of each house shall by yeas and nays, ratify such proposed amendments, they shall be valid to all intents and purposes, as parts of this Constitution, provided that such proposed Amendments, shall be read on three several days, in each house, as well when the same are proposed as when they are finally ratified. At the last session of the General Assembly certain amendments proposed by the preceding Assembly were acted on and declared to be finally ratified."

The 12th Amendment was one of them.

Here were safeguards that nowhere appear in the proposal of the Eighteenth Amendment.

The fallacy of such a line of argument, when applied

to the question of changing the form of government under the Federal Constitution, is too apparent to call for further citation of authorities. Such a "practice" would mean the abdication of the functions of the Supreme Court of the United States.

The argument fails entirely to distinguish between amending the Organic Law, and the enactment of a Bill, or the passing of a Resolution, either one of which may be altered, amended, or repealed the same day of its passage, or by a succeeding session of that or a later Congress.

Can it be seriously contended that Senator Mason, Senator Trumbull "Hinds' Precedents" and the ruling of Speaker Reed and the Missouri case are final authority in construing and interpreting the final meaning of vital parts of Constitutional law; and that such authority is to supplant and control the decision of the Supreme Court of the United States, Marbury vs. Madison, McCulloch vs. Maryland, *supra*, to the contrary?

Those advocates of the proposition that *two-thirds of those present, a quorum being present*, is all sufficient in passing a Bill over the President's veto, and in proposing Amendments to the Constitution, have, with great confidence and enthusiasm, cited Cooley on Constitutional Limitations, 7th Ed., Page 201, in support of their claim. Turning to that page, we discover that the quotation occurs in Chapter VI, under the title: "OF THE ENACTMENT OF LAWS," and the citation reads:

> "For the vote required in the passage of any particular law, the reader is referred to the Constitution of the State. A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that the pro-

portion of all the members, or of all those elected, is intended."

Have these "advocates" failed to observe that Judge Cooley is discussing *only* the passage of Bills?

A careful examination of Judge Cooley's learned Treatise, fails to discover one word as to the method or procedure in proposing Amendments to the Constitution.

THE MISSOURI-PACIFIC-KANSAS CASE.

Counsel has not overlooked the case of the Missouri Pacific Railway Company against State of Kansas, decided by this Court at the October Term 1918, and he is not unmindful of the fact that the decision in that case may be cited as having weight in the case now before the Court. But Counsel respectfully asks this Court carefully to re-consider the effect of the Decision in that case.

The Brief of Counsel for the well-known apostle of Prohibition filed in the Missouri Pacific-Kansas case, was filed in the case of State, ex rel. Erkenbrecher vs. James M. Cox, as Governor of Ohio, to enjoin that official from transmitting to the General Assembly of Ohio, the proposed Eighteenth Amendment, referred to in the Motion for leave to file a Brief in this Court, in support of Complainant's Bill. The argument and criticism of authorities in the preceding paragraph of the present Brief are based upon the Brief filed by the Counsel mentioned. Only recently has Counsel had the opportunity of reading the other Briefs of Counsel for Plaintiff and Defendant in Error in the Missouri-Kansas case.

Counsel has not been able to understand how the great question of interpreting Article V of the Constitution could have been properly involved in the Missouri-Kansas case, either by the Plaintiff or Defendant in Error. The passing of a Bill over the President's veto, involved in the Webb-Kenyon Act, has no relationship with amending the Constitution of the United States, as we view it. Pass-

ing a Bill which can be modified or reversed at the same or next Session of the Legislature, is as far apart from the business of amending the Constitution and changing the form of government, as the North Pole is from the South, as we view the subject, and those arguments might now be ignored. And from the paucity of arguments, if we may be allowed to use the term, for Plaintiff and Defendant in Error in that case, on the great question of amending the Constitution, we submit that this Court would be justified in placing little weight upon them now.

References made in the Court's Opinion in the Missouri-Kansas case to the Resolution adopted in the Senate at the first Session of the First Congress, September 9, 1789, Senate Journal 77, on the "Articles to be proposed to the Legislatures of the States as Amendments to the Constitution of the United States," etc.,—presumably the first ten Amendments, where the wording runs: "Two-thirds of the Senators present concurring therein." *Non constat,* "two-thirds of the Senators present" might have well been *two-thirds* of the *membership.* Furthermore, it should be considered that at the first Session of the first Congress, procedure of great moment would not be well defined, and it should not be forgotten that a considerable number of the states were insistent as a condition precedent to the ratification of the Constitution, that the ten Amendments should be passed and incorporated as a Bill of Rights. Counsel has not had access thus far to the Journal of the Senate. He has examined the Journal of the House for that Session, and that Journal shows in only one case the vote by yeas and nays on *two* of the ten Amendments—now the first Amendment, respecting the "Establishment of Religion" and Article VI relating to "Criminal Prosecutions," etc., where the vote showed thirty-seven for, and fourteen against. The Journal does not show how many Representatives composed the House at that time; whether any were paired,

or whether there were any vacancies. The same meagerness of details would be natural in the Senate.

In the "Annals of Congress" before cited, Vol. 1, pp. 808-809, we find a Resolution adopted in the House bearing on the same subject, reading as follows:

> "RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses deeming it necessary), That the following Articles be proposed to the legislatures of the several states as Amendments to the Constitution of the United States, all or any of which Articles when ratified by three-fourths of the State Legislatures to be valid to all intents and purposes as part of the said Constitution."

It is significant that at this first Session of the Congress, *necessity* for proposing an Amendment was indispensable.

Finally, whatever form of procedure for amendment of the Constitution might have been followed at the first or any subsequent Session of the Congress it is for the Supreme Court to say, what were the *intent* and *meaning* of the framers of the Constitution as to amending its provisions.

PROCEEDINGS OF THE FIRST CONGRESS ON AMENDMENTS.

In the "Annals of the 1st Congress 1789-1791, Vol. I," which comprises "The Debates and Proceedings in the Congress of the United States," printed and published in Washington by Gales & Seaton, from "authentic materials," at the Session beginning March 4, 1789, appears an introductory note, reading:

> ["This seems to be a proper place to notice a fact, which is necessary to account for the meagerness of the report of the Senate proceedings in the earlier

days of the government, viz., that the Legislative as well as Executive sittings of the Senate was held with *closed doors,* until the second Session of the third Congress, with the single exception of a discussion of the contested election of A. Gallatin, as Senator from Pennsylvania, during which discussion the galleries were opened by a special order of the Senate."]

For the purpose of bringing before the Court the debates which took place in discussing the Ten Amendments which were proposed at the Session of those taking part in their discussion, we have made rather copious abstracts.

At page 432 (June 8, 1789) Mr. Madison says:

"It can not be a secret to the gentlemen in this House, that, notwithstanding the ratification of this Government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities, yet still there is a great number of our constituents, who are dissatisfied with it; among whom are many respectable for their talents and patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard through inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under the Constitution. * * * It is to provide those securities for liberty which are required by a part of the community. I allude particularly to those two states that have not thought fit to throw themselves into the bosom of the Confederacy."

* * * "And in this case it is necessary to proceed with caution; for while we feel all these inducements to go into a revisal of the Constitution, we must feel for the Constitution itself, and make that

revisal a moderate one. I should be unwilling to see a door opened for a reconsideration of the whole structure of the Government—for a reconsideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself. But I do wish to see a door opened to consider, so far as to incorporate provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents: such as would be likely to meet *with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures.* I will not propose a single alteration, which I do not wish to see take place, as intrinsically proper in itself, or proper because it is wished for by a respectable number of my fellow citizens; and therefore I shall not propose a single alteration but which is likely to meet the concurrence required by the Constitution." * * *

"It is a fortunate thing that the objection to the Government has been made on the ground I stated; because it will be practicable on that ground, to obviate the objection, so far as to satisfy the public mind *that their liberties will be perpetual, and this without endangering any part of the Constitution,* which is as essential to the existence of the Government by those who promoted its adoption."

Then follows an outline sketch of the principles to be embodied in the proposed Amendments, (practically the Ten Amendments later proposed and ratified). Much might be added showing the purpose and material of the proposed Amendments, and the importance of incorporating a Specific Bill of Rights in the Constitution, and emphasizing the principle, "that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States."

Madison then said (p. 442): "I shall content myself for the present by moving 'that a Committee be appointed to consider of and report such Amendments as ought to

be proposed by Congress to the Legislatures of the States, to become, if ratified by three-fourths thereof, part of the Constitution of the United States.' "

Mr. Gerry, on page 447, says: "The ratification of the Constitution in several States would never have taken place had they not been assured that the objections would have been duly attended to by Congress."

Mr. Madison's Motion was then referred to a Committee of the Whole.

On July 21, when the House was considering a motion to go into Committee of the Whole to consider proposed Amendments, Mr. White said, p. 660: "Some of the proposed Amendments were also of high value; but he did not expect they would be supported by *two-thirds of both Houses,* without undergoing a thorough investigation."

At page 663, Mr. Ames, speaking on the motion, said: "This public discussion would be like a dissection of the Constitution; it would be defacing its symmetry, laying bare its sinews and tendons, ripping up the whole form, and tearing out its vitals; *but is it presumable that such conduct would be attended with success? Two-thirds of both Houses must agree in all those Motions before they can have effect.*"

Mr. Gerry "inquired of his colleagues, how it was possible that the House could be a federal convention without a Senate, *and when two-thirds of both Houses are to agree to the Amendments?*"

"Two-thirds of both Houses," and "two-thirds of Each House," are expressions continuously occurring throughout the debates, without any reference to "majority" or of "those present."

Counsel has made an exhaustive search of the proceedings of this First Congress, when the proposed Ten Amendments were under debate, and nowhere has he been able to find the record of any vote of either House on the proposal for submitting those Amendments—Speaker Reed to the contrary. And we feel justified in

asserting that the Records of Congress do not show the actual vote in either Senate or House on either one or all of the first Ten Amendments. This is in part explained by the note in brackets at the beginning of the citations from the Annals.

CONCLUSION.

Counsel has taken much time of the Court, in presenting an argument of such length as is set forth in the foregoing Brief. But we approached the subject, and have developed the argument, under the conviction, that at no time since the ratification of the Constitution, has a question more vital to the welfare and happiness of the people of the United States, or more vital in respect to the permanence of a representative form of government, as framed by the founders of the republic, ever been before the Supreme Court of the United States, than the question now involved in the case brought by the State of Rhode Island. And our conviction is without limitation, that nothing would so stabilize and establish the government of the United States on a sure foundation, as a decision by this court, that to propose an amendment to the Constitution, Article V requires that a vote of two-thirds of the membership of both Houses is necessary.

Respectfully submitted,

AARON A. FERRIS,
Of Cincinnati, Ohio, as *Amicus Curiæ*.

March 15, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND, COMPLAINANT, v. A. MITCHELL PALMER, ATTORNEY General, and Daniel C. Roper, Commissioner of Internal Revenue, defendants.	No. —. Original.

RESPONSE TO ORDER TO SHOW CAUSE.

In response to the order of the court to show cause why the bill in this case should not be filed, the respondents, A. Mitchell Palmer, Attorney General of the United States, and Daniel C. Roper, Commissioner of Internal Revenue of the United States, say that the bill presents no controversy of which this court has original jurisdiction for the reasons hereinafter assigned.

I.

The bill challenges the validity of the eighteenth amendment to the Constitution of the United States, the first section of which is as follows:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

It is alleged that the Congress, by resolution, submitted to the States, for ratification, this amendment and that the legislatures of three-fourths of the States, have, by resolution, ratified it in the form provided in the case of a valid amendment to the Constitution of the United States, and that such ratifying resolutions have been certified and forwarded to the Secretary of State of the United States. It is alleged that the Legislature of Rhode Island refused to ratify the proposed amendment. There is also an allegation that there exist in the State of Rhode Island numerous manufactories for the production of intoxicating liquors for beverage purposes as permitted by the laws of that State and that, under the laws of Rhode Island, as enacted in 1909 and amended in 1919, the State, through its municipal subdivisions, grants licenses for the manufacture and sale of nonintoxicating liquors for beverage purposes, said nonintoxicating liquors being defined as including "all distilled or rectified spirits, wines, fermented and malt liquors, which contain one per centum and not more than four per centum by weight of alcohol." It is then alleged that Congress has passed an act known as the Volstead Act for the purpose of enforcing the Eighteenth Amendment, by the terms of which the manufacture and sale for beverage purposes of all liquors containing as much as one-half of one per centum of alcohol are prohibited and that the duty of enforcing this act is placed upon the Department of

Justice and the Internal Revenue Commissioner of the United States. It is also alleged that the State of Rhode Island derives large revenues from the business of manufacturing and dealing in intoxicating or nonintoxicating liquors for beverage purposes.

The prayer of the bill is that the defendants, the Attorney General of the United States and the Commissioner of Internal Revenue their assistants, subordinates, agents, and servants, be enjoined from enforcing or attempting to enforce the provisions of the Volstead Act within the State of Rhode Island or from in any manner interfering with the manufacture, sale, barter, transport, delivery, furnishing, or possession of intoxicating liquor for beverage purposes within that State upon the ground that the eighteenth amendment and the Volstead Act are unconstitutional and void.

It is distinctly alleged that the amendment in question was submitted by Congress and ratified by the legislatures of three-fourths of the States in the manner provided by the Constitution for the submission and ratification of amendments thereto. No question is made as to the manner in which the amendment was either submitted or ratified. The gravamen of the bill is that the nature of the amendment is such that Congress was without power to submit it and that the legislatures of three-fourths of the States were without power to ratify it so as to make it a part of the Constitution and binding on

those States which did not ratify. The allegation is that it is not "an amendment to the Constitution of the United States within the intent, purview, and scope of Article V of the Constitution of the United States, but is an unconstitutional and revolutionary proposal to the legislatures of the several States of a revision and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the Government established thereby under the form and guise of a proposal of a valid amendment to the Constitution of the United States."

The contention is that the "power of police and economy with respect to the internal affairs of the State" was reserved to the State by the Constitution and can not by an alleged amendment to the Constitution, or otherwise, be taken away from the State except by its consent.

II.

Question Involved.

The State of Rhode Island asked leave to file its bill against two individuals who are alleged to be citizens of the States of Pennsylvania and South Carolina, respectively, and who are also described as Attorney General and Internal Revenue Commissioner, respectively, of the United States. The purpose is to prevent the enforcement of an act of Congress alleged to be unconstitutional, because the amendment to the Constitution, regularly submitted

and ratified, under the authority of which it was enacted, is itself unconstitutional and invalid. The act in question operates not directly upon the State but upon its individual citizens, who are also citizens of the United States. No property rights of the State are involved. True, it is alleged that the enforcement of the act will affect private property and private business from which the State has been accustomed to derive revenue. This, however, is a remote, collateral, and indirect interest. The power of taxation is a part of the sovereignty of a State. The restrictions enacted by Congress in this law are imposed upon individuals. The only effect upon the revenues of the State is such as results from making it unlawful to conduct a business with respect to which the State has heretofore exercised its right of taxation. The question, therefore, at the threshold of this case is whether a State by an original bill in this court may challenge the constitutionality of an act of Congress upon the ground that the result is to adversely affect the property or rights of citizens of that State, or upon the ground that Congress has attempted to legislate in a field in which the State has the exclusive right to legislate.

III.

Original jurisdiction of the Supreme Court.

Authority for filing an original bill in this court must be found in section 2 of Article III of the Constitution, which first defines generally the judicial power of the United States and enumerates the cases

to which it shall extend, and then, from these cases, selects those in which the Supreme Court shall have original jurisdiction. The cases within the judicial power of the United States are enumerated as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

No case can be maintained in any court of the United States unless it be one of those enumerated. In general, the jurisdiction of the Supreme Court is appellate; but the framers of the Constitution found reasons for conferring upon that court a limited original jurisdiction in certain cases cognizable generally by the Federal courts. The line between its original and its appellate jurisdiction, however, was clearly drawn, as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all

> the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It will thus be seen that the judicial power of the United States extends, among other cases, to all cases (1) arising under the Constitution, the laws, or the treaties of the United States; (2) controversies to which the United States shall be a party; (3) controversies between two or more States; (4) controversies between a State and citizens of another State; (5) controversies between citizens of different States. Of these cases, the Supreme Court is given original jurisdiction only of those in which a State shall be a party. The result is that where the jurisdiction depends alone upon the fact that the case arises under the Constitution, the laws, or the treaties of the United States, or upon the fact that the United States is a party, the jurisdiction of this court is only appellate. But where a State is a party, whether the case would fall within one of the two classes just mentioned or not, the jurisdiction is original. Where, therefore, the controversy is between two or more States, between a State and citizens of another State, or between a State and the United States, and is otherwise cognizable by the Federal courts, the jurisdiction is original. In other words, the original jurisdiction extends to all cases in which a State may of right be made a party defendant and to all cases in which a State may of right institute a suit in a court of the United States.

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This construction of the Constitution is clearly settled by the case of *United States* v. *Texas* (143 U. S. 621, 644), where it was said:

> That instrument extends the judicial power of the United States "to *all* cases" in law and equity arising under the Constitution, laws, and treaties of the United States and to controversies in which the United States shall be a party and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party"—that is, in all cases mentioned in the preceding clause in which a State may of right be made a party defendant, as well as in all cases in which a State may of right institute a suit in a court of the United States.

In order, however, to give this court original jurisdiction it is not sufficient that a State assumes to sue or is named as a defendant. To be maintained in the name of a State the suit must be brought against a party whom the State has the right to sue, and the controversy submitted must be one which the State has the right to have determined by the courts. In *Wisconsin* v. *Pelican Insurance Company* (127 U. S. 265, 287) it was said:

> Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens.

In that case the bill was filed by the State of Wisconsin against the insurance company upon a judgment rendered by one of the courts of Wisconsin for a penalty. It was within the letter of the Constitution—that is, it was a suit involving a controversy between a State and a citizen of another State. But jurisdiction was denied because the courts of no country execute the penal laws of another, and hence the controversy was one as to which a State could not of right sue a citizen of another State except in its own courts.

So, when the State of New Hampshire undertook to sue the State of Louisiana to collect bonds issued and sold by the latter State, jurisdiction was denied, notwithstanding the case involved a controversy between two States, for the reason that the bonds sued on belonged not to the State of New Hampshire, but to her citizens, for whom she had undertaken to collect them. In other words, the real controversy was between citizens of the State of New Hampshire and the State of Louisiana, and therefore the suit was expressly forbidden by the Eleventh Amendment to the Constitution. *New Hampshire* v. *Louisiana*, 108 U. S. 76. Had the State of New Hampshire itself owned the bonds sued on, the jurisdiction would have existed, as was held in *South Dakota* v. *North Carolina*, 192 U. S. 286.

The point is that before a State may maintain a suit in this court it must present a justiciable controversy arising directly between it and the State or

citizens whom it sues. Thus, it was said in *Louisiana v. Texas*, 176 U. S. 1, 16:

> In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.

And in a concurring opinion in the same case, at pages 24–25, Mr. Justice Harlan said:

> The word "controversies" in the clauses extending the judicial powers of the United States to controversies "between two or more States," and to controversies "between a State and citizens of another State," and the word "party" in the clause declaring that this court shall have original jurisdiction of all cases "in which a State shall be party" refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in

> this court. If this be not so, we were wrong in *New Hampshire* v. *Louisiana*, 108 U. S. 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this court against the debtor State.

In the case last referred to the State of Louisiana sought to file a bill against the State of Texas, her governor, and her health officer to enjoin the enforcement of certain cattle quarantine laws enacted by the State of Texas, upon the allegation that these laws as they were being administered operated unjustly against cities located in Louisiana and in favor of cities located in Texas. After holding that the controversy was not one which would support a suit by the State of Louisiana against the State of Texas, it was said, at page 23:

> Finally we are unable to hold that the bill may be maintained as presenting a case of controversy "between a State and citizens of another State."
>
> Jurisdiction over controversies of that sort does not embrace the determination of political questions.

Of course, where a State sues to collect a debt due to her or to assert or protect property rights there is no question of the original jurisdiction of this court, as shown by the long line of cases involving controversies over the boundary lines between States. Another class of cases in which the jurisdiction exists embraces those cases in which the State seeks to

enjoin either another State, or citizens of another State, from doing acts which constitute a public nuisance and menace to public health within the State. *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. The right of the State to sue in these cases rests, partly at least, upon the fact that public nuisances cannot ordinarily be abated at the suit of individuals, except in so far as they may result in actual damage to individuals, and thus be also private nuisances. The right to protect the public against such wrongs is a right which belongs distinctly to the State. Moreover, in *Georgia* v. *Tennessee Copper Co.*, *supra*, it is shown that the maintenance of such suits by the States involves in some measure the assertion of property rights. Thus, it was said, p. 237:

> The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to

> whether the destruction of forests has led to the gullying of its roads. * * *
>
> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas; that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control; that the crops and orchards on its hills should not be endangered from the same source.

Another thing that now seems beyond controversy is that where the question involved is one between two governments asserting conflicting rights to perform governmental functions it is a political question to be decided by the political branch of the Government and is not justiciable. *Luther* v. *Borden*, 7 How. 1; *State of Mississippi* v. *Johnson*, 4 Wall. 475; *State of Georgia* v. *Stanton*, 6 Wall. 50; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

It may fairly be said, then, that it is now thoroughly settled that in order for a State to maintain a suit in this court it must present a controversy to which it is directly a party and which is not merely political but is justiciable, and the defendant must be a party which the State has the right to sue in a Federal court. To this may be added the statement that the United States has not given its consent to be sued in the Supreme Court, and therefore that court has no jurisdiction to entertain a suit against it even when brought by a State. (*United States* v. *Louisiana*, 123 U. S. 32, 36; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68–69.)

IV.

Objections to jurisdiction.

There are three distinct propositions, on any one of which jurisdiction in the present case must fail.

1. If a justiciable controversy is presented it is not one to which the State of Rhode Island is a real party, but arises wholly between individuals and corporations of that State and the individuals of other States who are named as defendants. The effort is to institute a suit in the name of the State, but in vindication of the alleged grievances of particular individuals.

2. If it can be said that there is a justiciable controversy to which the State of Rhode Island is a real party, it is a controversy between that State and the United States over the respective rights of the two Governments to legislate in prohibition of the liquor traffic, and hence the United States and not the individuals named is the real defendant, and this court is without jurisdiction.

3. In the last analysis the only controversy presented is whether the Eighteenth Amendment is of such a nature that it could be submitted and ratified in the manner provided by the Constitution. This is purely a political question and not justiciable, no matter by what parties presented.

V.

The bill presents no controversy to which the State of Rhode Island is a real party.

If it be assumed that there is in this case any justiciable question, the first inquiry is whether the State of Rhode Island is a real party, or whether it seeks

to bring this suit in vindication of the alleged grievances of individuals. As we have seen, jurisdiction does not exist when the State is seeking to collect debts due by another State to its citizens, nor does it exist where the State seeks to enjoin the administration of the laws of a sister State upon the ground that they infringe the private rights of its own citizens. The act now assailed was passed to enforce a constitutional amendment, which operates alike upon citizens throughout the United States and which does not attempt to operate directly upon any State government. The Federal officials who are made defendants have taken, or will take, no steps which will affect the property rights of the States. But whatever action they take will come in conflict only with the alleged rights of citizens of the State. If the law under which these officials act is invalid, then any citizen of any State whose rights are affected can obtain redress in the proper court. To obtain this redress in the courts of the United States held in their own State it would not be necessary to obtain jurisdiction of the Federal officials at Washington who are named in this bill. The specific acts of which they would complain would not be performed by these officials, but by the United States district attorney and the representative of the Commissioner of Internal Revenue located in their own State. If the State should succeed in this suit, it would accomplish only what could be

accomplished by the citizens actually affected by the law through suits instituted in courts located in their own State. Since the question is whether certain political powers still belong exclusively to the State of Rhode Island, or whether they may also be exerted by the Federal Government, the State may naturally desire to have it settled, but courts do not sit to declare abstract propositions of law or to interpret statutes or constitutions merely at the request of those who are curious to know. Such questions can be properly decided by the courts only when their decision is necessary to determine rights growing out of actual controversies between parties litigant. Whether Congress had the power to pass the Volstead Act can properly be decided only when some party litigant appears in a court having jurisdiction, asserting a justiciable right contrary to its provisions. This can occur only when rights of property or persons become involved. At last, the question sought to be presented for determination is whether the defendants named in the bill have the lawful right to take the necessary steps to punish those citizens of Rhode Island who violate the provisions of the act of Congress in question. The State itself seeks to have that question adjudicated. This bill, therefore, is nothing more than an action in vindication of alleged grievances of particular individuals and is condemned by the authorities above cited.

VI.

If the State of Rhode Island can be regarded as a real party to a justiciable controversy, then the real party defendant is not the officials named as such, but is the United States, and the court is without jurisdiction.

The only controversy presented by the bill to which the State of Rhode Island can be said to be in any sense a party is presented by the question whether Rhode Island still has the exclusive right to prohibit within its borders the sale and manufacture of intoxicating liquors, or whether, by virtue of the Eighteenth Amendment, Congress now has the power to pass a prohibition law which shall be effective within the State of Rhode Island and operative on its citizens. In this question the defendants named, as citizens of Pennsylvania and South Carolina, respectively, have no more interest than other citizens of the United States. They are made parties only because they are officials of the United States Government charged with the duty of enforcing the law which is assailed. On the other hand, the Government of the United States has exactly the same interest in the question which the government of the State of Rhode Island has. If it is justiciable at all, it is justiciable between the real parties in interest, and only between them. If Rhode Island can litigate the question at all, she must bring before the court the real party in interest. She can not sue the United States in this court, because consent for such a suit has not been given, and hence it is sought

to have the question determined by naming as defendants certain individuals who happen to be officials of the United States. Such a suit will be regarded as a suit against the United States and can not be maintained in this court. Speaking of a similar case it was said:

> While the nominal defendants are citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant. (*Oregon* v. *Hitchcock*, 202 U. S. 68–69.)

For this reason, a suit brought against the Secretary of the Interior was dismissed as being really a suit against the United States in a matter in respect to which the United States had not consented to be sued. Previously, a somewhat similar suit had been maintained, but upon the express ground that the effect of an act of Congress had been to give consent that the United States should be sued by making the Secretary of the Interior a party. *Minnesota* v. *Hitchcock*, 185 U. S. 373.

Since then the only controversy which the State of Rhode Island presents is one between it and the United States, if the question is justiciable at all the suit must be regarded as one against the United States. The question then is whether the United States has consented to be sued in such case. It will be seen that the Constitution does not expressly confer jurisdiction upon any Federal court of con-

troversies between the United States and a State. It does, however, extend the judicial power to "controversies to which the United States shall be a party," and also provides that this court shall have original jurisdiction in cases "in which a State shall be party." It has, accordingly, been held that this court has original jurisdiction of a suit in which the United States is plaintiff and a State is defendant. The reasons for sustaining this jurisdiction were stated thus:

> The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the con-

> sent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. (*United States* v. *Texas*, 143 U. S., 621, 646.)

In other words, a case in which the United States has given its consent to be sued and which can, as of right, be instituted by a State, may be commenced in this court, but unless such consent has been given such suit can not be instituted in any court.

The Constitution itself did not confer any right to sue the United States. In extending the judicial power to suits to which the United States should be a party, it merely brought within the jurisdiction of the courts only suits in which the United States should be plaintiff or in which it should thereafter consent to be sued. The acts of Congress under these sections of the Constitution have been so construed in *United States* v. *Louisiana* (123 U. S. 36):

> The judiciary act of 1789, it is true, declares that the "Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." This clause, however, can not have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party.

It may be conceded that if Congress should pass an act consenting that the United States might be sued by a State to determine questions such as are presented by this bill, the original jurisdiction would be in this court. But Congress has given no such consent. It has carefully limited the cases in which the United States may be sued to such cases as may be brought in the Court of Claims and the District Courts of the United States under sections 24 and 145 of the Judicial Code, and certain other cases in which suits may be brought in particular courts. The result is that the United States in a proper case may maintain a suit in this court against a State, but that a State can in no event maintain a suit against the United States. Hence, as in *Oregon* v. *Hitchcock*, *supra*, when it has appeared that the defendants are individuals who happen to be Federal officials, the controversy is, in fact, one between the State and the United States and jurisdiction has always been denied.

VII.

The only controversy presented is whether the eighteenth amendment is of such a nature that it could be submitted and ratified in the manner provided by the Constitution and thus become a part of the Constitution. This is a political and not a justiciable question.

Even if it could be said that the State of Rhode Island is a real party to the actual relief sought, and that if entitled to that relief the parties named are the proper defendants, jurisdiction must still fail for

the reason that when the bill is examined it is clear that the only controversy presented involves a purely political question and one which is not justiciable, no matter by what parties raised. The sole ground upon which the Volstead Act is asserted to be unconstitutional is that the eighteenth amendment is not valid. It is conceded that this amendment has been submitted and ratified in the form provided by the Constitution. The sole attack upon it is that it takes from the States certain reserved rights which it is claimed cannot by constitutional amendment or otherwise be taken from any State without its consent. In other words, it is asserted that the nature of this amendment is so revolutionary that it was beyond the power of Congress to submit it and beyond the power of the legislatures of three-fourths of the States to ratify it so as to make it binding upon the State of Rhode Island, which declined to ratify. The court is thus invited to assume the function of determining both for Congress and for the legislatures of the various States what, if any, amendments may be made to the Constitution without the consent of all the States.

When a constitution or a constitutional provision is once adopted, it is undoubtedly the function of the courts to construe and interpret its provisions and to determine the extent of the powers conferred. They have the necessary jurisdiction to determine whether the action of Congress or of any State legislature is in conflict with the provisions of the Constitution. But the courts had no voice in determining what the Con-

stitution as originally adopted should be, nor has it ever been claimed that they have been given power or jurisdiction to place any limit or restriction upon the number or the character of changes which might be made through the adoption of amendments in the manner provided by the Constitution. Such jurisdiction would be equivalent to a veto power through which the courts and not Congress would finally determine what amendments the people should be given the opportunity to adopt. Not only can no such power be inferred from anything in the Constitution, but its assertion is directly in conflict with the express provisions of the Constitution.

The framers of the Constitution did not indulge the delusion that they were framing a perfect instrument or that, adapted, as they believed it was, to existing conditions, it would be in all respects the best Constitution that could be devised to meet conditions which would from time to time arise. In what respects changes would improve their work they could not foresee. They did not undertake to determine whether if changes should thereafter be made they should consist either of broadening the powers delegated to the Federal Government or restricting those reserved to the States. It might well be that experience would show either that some of the powers delegated to the Federal Government should be reclaimed by the States, or that some of those reserved to the States should be surrendered to the Federal Government. At any rate, they inserted Article V,

providing a method by which Congress and the States should accomplish amendments to the Constitution as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

It will thus be seen that the power is conferred upon Congress, by a two-thirds vote of both Houses, to propose amendments to the Constitution at any time, and there is not the slightest indication of a purpose to prescribe or limit the nature of such amendments, except that until a certain date no amendment shall be made affecting one or two matters. Moreover, a mandate is placed upon Congress to call a convention for proposing amendments

whenever legislatures of two-thirds of the States shall request this to be done. The amendments, whether submitted by Congress or by such a convention, are to become parts of the Constitution when ratified by the legislatures of three-fourths of the States or by conventions in three-fourths thereof. Amendments so ratified by the legislatures of three-fourths of the States are to be binding on all the States with a single exception. It is provided that no State shall, without its consent, be deprived of its equal suffrage in the Senate. The making of this exception to the three-fourths rule is conclusive that the framers of the Constitution intended to place no other restriction upon the nature of amendments that might be adopted by three-fourths of the States. Clearly, then, there is expressly committed to Congress and the legislatures of the various States, and to no other authority, the power to determine what changes may wisely and appropriately be made in the form of government provided by the original Constitution. When, therefore, as in this case, an amendment has been regularly submitted and ratified, all inquiry into its validity is foreclosed.

All questions as to what a Constitution or a constitutional amendment means are, of course, justiciable. But the question as to what constitution shall be adopted, or in what respects an existing constitution shall be altered, are governmental and political. The ultimate forum provided by the Constitution for their determination consists of the legislatures of the various States, the action of three-

fourths of them being binding on all. The State of Rhode Island had the right to make its fight against the adoption of the Eighteenth Amendment by bringing to bear such influence as it could upon the legislatures of its sister States, but from the decision of three-fourths of those States upon this question of policy there was no appeal.

The question now presented is of the same character as contentions arising under the provision of the Constitution guaranteeing to the States a republican form of government. These questions have always been held by the courts to be political and not justiciable. *Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

The fact that a State claims that an act of Congress has the effect of depriving it of some of its powers, or even of destroying its existing government, raises questions which are purely political. That such questions are not justiciable has been so thoroughly understood that we believe only twice has a State sought to have them adjudicated by this court. These were cases in which the States of Mississippi and Georgia sought to file bills in this court shortly after the Civil War upon the ground that an act of Congress providing a government for these States was unconstitutional and destroyed their State governments. It was held that the questions were political and not within the jurisdiction of the court. In the Mississippi case, that State asked leave to file a bill against Andrew Johnson, a citizen of the State of Tennessee and President of the

United States, and General Ord, who had been assigned to act as military commander of the district of Mississippi, to enjoin them from executing an act of Congress providing "for the more efficient government of the rebel States." The court said (*State of Mississippi* v. *Johnson*, 4 Wall. 475, 500):

> It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?
>
> The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> The impropriety of such interference will be clearly seen upon consideration of its possible consequences.
>
> Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Repre-

sentatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

The State of Georgia filed a similar bill against the Secretary of War and certain generals of the Army, just as in this case the Attorney General, one of the Cabinet officers, is made a defendant. The court, after referring to the constitutional provision defining the judicial power and stating that the bill "presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction," said (*State of Georgia* v. *Stanton*, 6 Wall. 50, 75–76):

> But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.
>
> The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial

> cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the Government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise, would, be maintained.
>
> * * * * *
>
> That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

These two cases would seem to put beyond doubt the want of jurisdiction to entertain this suit. This is a suit in equity and, all other questions aside, cannot be maintained unless it involves rights of persons or property. Until such rights do become involved, the power to issue an injunction does not

exist. The allegations as to the taxes which Rhode Island has derived from the liquor business present no question of property rights. They do not assert that the State will be deprived of a fund now existing or to which its right has accrued, but only that this law will prevent the continuance of such business and thus taxes may not, in the future, be collected for want of subject matter. This sets up no deprivation of property. The State may still levy the tax, but if, for any reason, the liquor is not made or sold the tax will not produce revenue. In like manner, the United States taxes liquors, but this has never prevented the States from prohibiting their manufacture and sale and thus depriving the United States of revenue.

CONCLUSION.

In conclusion, it is respectfully submitted that the complainant must take one of two horns of a dilemma. Either the controversy is between it and these defendants, but is not justiciable and therefore the court is without jurisdiction, or if the controversy is, in fact, justiciable, it is one between a State and the United States, and the United States not having consented to be sued the jurisdiction must be denied.

ALEX. C. KING,
Solicitor General.

WILLIAM L. FRIERSON,
Assistant Attorney General.

DECEMBER, 1919.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND, COMPLAINANT, *v.* A. MITCHELL PALMER, ATTORNEY GENERAL, and Daniel C. Roper, Commissioner of Internal Revenue, defendants.	No. 29, Original.

MOTION TO DISMISS.

Before answering the bill of complaint in the above-stated case come now the defendants therein and present this motion to dismiss said bill of complaint in the nature of a demurrer thereto, and pray that such bill be dismissed upon the following grounds:

First. Because the matters and things set up in said bill of complaint present no matter of a justiciable character between said complainant and these defendants, nor does it set up any subject matter properly invoking the jurisdiction of this court under the grant of judicial power to said court.

Second. Because the facts stated in said bill of complaint do not set up any cause of action.

Third. Because the said bill of complaint alleges no cause of action against these defendants or either of them.

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Fourth. Because there is no equity in said bill of complaint.

Wherefore these defendants pray that said bill of complaint be dismissed and these defendants be not further required to plead thereto.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.

WILLIAM L. FRIERSON,
Assistant Attorney General.

JANUARY, 1920.

○

MAR 1 1920
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—vs—

A. MITCHELL PALMER, ATTORNEY GENERAL AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, Defendants

---

Brief of Complainant on Motion to Dismiss

STATE OF RHODE ISLAND
HERBERT A. RICE
Attorney General
A. A. CAPOTOSTO
Assistant Atty. Genl.

PROVIDENCE:
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PROVIDENCE:
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Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—vs—

A. MITCHELL PALMER, ATTORNEY GENERAL AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, Defendants

Brief of Complainant on Motion to Dismiss

The State of Rhode Island alleges in its bill that the Sixty-fifth Congress of the United States of America at its Second Session begun and held at the City of Washington on Monday, the third day of December, A. D. one thousand nine hundred and seventeen, assuming a power not delegated to Congress by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, and of the rights of the people thereof, enacted a "Joint Resolution Proposing an Amendment to the Constitution of the United States", pretending to submit thereby to the Legislatures of the several States of the United States a so-called Eighteenth Amendment to the Constitution of the United States, whereby it was provided that the manufacture, sale and transportation of intoxicating liquors for beverage purposes within the State of Rhode Island should be prohibited;

said "Joint Resolution Proposing an Amendment to the Constitution of the United States" being in the following form:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

The complainant avers that the power exercised by Congress in enacting the said Joint Resolution, pretending to submit thereby to the Legislatures of the several States of the United States the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to Congress by the provisions of Article V of the Constitution of the United States, and the exercise by Congress of the power to enact such Joint Resolution,

as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, is not a proposal of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but is an unconstitutionl and revolutionary proposal to the Legislatures of the several States of a revision and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a proposal of a valid amendment to the Constitution of the United States and under the form and pretense of complying with constitutional procedure; and further, that the proposal of the so-called Eighteenth Amendment, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

The complainant further avers that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was unconstitutional, inoperative and void, on the 28th day of December, A. D. 1917, the Honorable Robert Lansing, Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, forwarded a certified copy of said "Joint Resolution Proposing an Amendment to the Constitution of the United States," to the Governor of each State of the United States, and that the Governors of the several States of the United States thereafter submitted the so-called Eighteenth Amendment to the Constitution of the United States, as set forth in the Joint Resolution of Congress, as aforesaid, to their respective Legislatures, and thereafter the Legislatures of three fourths of the several States

of the United States, assuming a power not delegated to said Legislatures by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, enacted resolutions of alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States as submitted by Congress, as aforesaid, under the form and pretense of complying with constitutional procedure provided in the case of a valid amendment to the Constitution of the United States, and thereafter certified copies of the resolution of alleged ratification of the so-called Eighteenth Amendment by the aforesaid Legislatures were forwarded to the State Department of the United States, the certification of the alleged ratification from each State illegally and erroneously setting forth that the so-called Eighteenth Amendment to the Constitution of the United States had been adopted as an amendment to the Constitution of the United States by the Legislature of said State according to the provisions of the Constitution of the United States.

The complainant further avers that the power exercised by each of the Legislatures of the several States of the United States in enacting an alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to the Legislatures of the several States of the United States by the provisions of Article V of the Constitution of the United States, and the exercise by each of the Legislatures of the several States of the power to enact a resolution of alleged ratification of the so-called Eighteenth Amendment, as aforesaid, was a proceeding unconstitutional and revoluntionary; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States as aforesaid, was

not a ratification of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but was an unconstitutional and revolutionary proceeding in reference to a revision of and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a ratification of a valid amendment to the Constitution of the United States, and under the form and pretense of complying with constitutional procedure; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

And complainant further avers that the Congress of the United States and the Legislatures of the several States of the United States are the representatives and agents of the people of the United States in proposing and ratifying amendments to the Constitution within the intent, purview and scope of Article V of the Constitution of the United States, and within the intent, purview and scope of the original delegation of powers to the people of the United States under the Constitution of the United States; and that the alleged proposal by Congress, as aforesaid, and the alleged ratification by the Legislatures of the several States, as aforesaid, were not within the scope of the original delegation of powers to the people of the United States and were not within the power and authority of Congress and the Legislatures as agents of the people of the United States; and further, that the Congress of the United States and the Legislatures of the several States, as aforesaid, are neither the judges of their respective powers nor of the

limitations thereof under the Constitution of the United States.

And complainant further avers that the Governor of the State of Rhode Island submitted the proposal of the so-called Eighteenth Amendment, as aforesaid, to two successive General Assemblies of the State of Rhode Island, said General Assembly being the Legislature of the State of Rhode Island, and both of said General Assemblies refused to enact any resolution in alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, and refused to regard or entertain the proposal of said so-called Eighteenth Amendment to the Constitution of the United States as a valid proposal of amendment, and the General Assembly of the State of Rhode Island has ever asserted and now asserts that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States is not a valid proposal of amendment to said Constitution, and that the General Assembly has no power or authority to ratify or approve said so-called Eighteenth Amendment as a valid amendment to the Constitution of the United States; and further, that the Constitution of the United States does not delegate to the government of the United States, nor to the people of the United States, any power of police and economy with respect to the internal affairs of the State of Rhode Island, nor is said power with respect to the internal affairs of the State of Rhode Island prohibited by said Constitution to the State of Rhode Island, but is expressly reserved to the State of Rhode Island and the sovereign people thereof; and further, that neither the power of police and economy with respect to the internal affairs of the State of Rhode Island nor the discretion in the exercise thereof can be bargained away, surrendered, yielded or transferred effectually to bind the

people of said State and their posterity, if at all, without "an explicit and authentic act of the whole people" of said State.

And finally the complainant avers that thereafter Congress, illegally and erroneously assuming that a power had been delegated to it by the provisions of the so-called Eighteenth Amendment, passed an act commonly known as the Volstead Act, with the intent and purpose of enforcing the so-called Eighteenth Amendment within the State of Rhode Island; that such portion of said Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, in so far as the same relates to the manufacture, sale, barter, transport, delivery, furnishing or possession of any intoxicating liquor within the State of Rhode Island, or the making of any of said acts within the State of Rhode Island a crime against the United States, said acts within the State of Rhode Island being lawful and authorized under the constitution and laws of the State of Rhode Island; that although the so-called Eighteenth Amendment is unconstitutional and void, and although such portion of the so-called Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, it is nevertheless the purpose, intent and threat (now executed) of the defendants to enforce the fines, imprisonments and forfeitures provided in said Volstead Act, as aforesaid, within the State of Rhode Island, on the ground that the manufacture, sale, barter, transport, delivery, furnishing, or possession of intoxicating liquor within the State of Rhode Island is contrary to law and a crime against the United States, although all said acts within the State of Rhode Island are lawful and authorized under the constitution and laws of said State; and alleging irreparable

injury and damage to the State of Rhode Island and to the people thereof, complainant prays injunctive relief.

(2) Motion to Dismiss

The motion for leave to file the bill having been granted, and the bill having been filed, the defendants now present the following motion to dismiss in the nature of a demurrer:

> "Before answering the bill of complaint in the above-stated case come now the defendants therein and present this motion to dismiss said bill of complaint in the nature of a demurrer thereto, and pray that such bill be dismissed upon the following grounds:
>
> "*First.* Because the matters and things set up in said bill of complaint present no matter of a justiciable character between said complainant and these defendants, nor does it set up any subject matter properly involving the jurisdiction of this court under the grant of judicial power to said court.
>
> "*Second.* Because the facts stated in said bill of complaint do not set up any cause of action.
>
> "*Third.* Because the said bill of complaint alleges no cause of action against these defendants or either of them.
>
> "*Fourth.* Because there is no equity in said bill of complaint.
>
> "Wherefore these defendants pray that said bill of complainant be dismissed and these defendants be not further required to plead thereto."

(3) Original Jurisdiction of Supreme Court

The jurisdictional power of this Court to afford equitable relief to the compainant turns upon the theory and averments of the bill that the so-called Eighteenth Amendment is usurpatory and void. The equity of the bill depends upon the correctness of its theory. *United States* v. *Lee*, 106 U. S. 196, (1882); *Ex parte Young*, 209 U. S. 123, 155, (1908); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, (1911); *Truax* v. *Raich*, 239 U. S. 33, 37, (1915); *Wilson* v. *New*, 243 U. S. 332, (1917); *Hammer* v. *Dagenhart*, 247 U. S. 251, (1918). A preliminary question therefore is presented for the determination of this Court, a question of constitutional interpretation. Is the so-called Eighteenth Amendment usurpatory and void? This brief is addressed to that issue.

In approaching any discussion of conflict between the respective powers of a State and those of the Nation, the words of Mr. Chief Justice Marshall, in the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 400, (1819), naturally recur. About to establish for all time the boundaries which separate the two jurisdictions, he thus solemnly prefaced his opinion in that case: "The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this

tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."

In the same case, the Chief Justice, in considering the jurisdiction of this Court and the high duty imposed upon it by the Constitution, observed: "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." And he added: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Two years later, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 384, (1821), Mr. Chief Justice Marshall, with keen insight to the possible necessity of a later day, laid down a rule of construction that is here applicable. In speaking of the proposition that the judicial power of every well-constructed government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of its constitution, he said:

"If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purports to establish this principle, shall be contracted for the purpose of destroying it."

This rule of construction as to the extent of the judicial power, thus stated in *Cohens* v. *Virginia*, was approved and applied in the noted case of *Ableman* v. *Booth*, 21 How. 506, 520, (1858). There Mr. Chief Justice Taney made it clear that it was within the province of this Court to check usurpation and to protect the States from encroachment upon their reserve powers by the general government, that the supremacy of the Constitution might be maintained. In delivering the opinion of the Court, he asserted:

"The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be *an assumption of power beyond the grants in the Constitution.*

"This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also *to guard the States from any encroachment upon their reserved rights by the General Government.* And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the

limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress.

* * *

"So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating *controversies between sovereignties*, which in other countries have been determined by the arbitrament of force."

In the last judicial paper from the pen of Mr. Chief Justice Taney, an opinion upon the question of jurisdiction in the case of *Gordon* v. *United States*, 2 Wall. 561, (1864), reported in *Gordon* v. *United States*, 117 U. S. 697, 700, (1864), that eminent jurist positively declared the powers and duties of this tribunal in cases of conflicting sovereignties. This opinion furnishes ample support to complainant's cause. We quote from it extendedly:

"The position and rank, therefore, assigned to this Court in the Government of the United States, differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights.

"The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the

United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, *an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose,* and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

"In No. 38 of the Federalist, written by Mr. Madison, the necessity and object of this provision is clearly stated. In that number, after explaining with great perspicuity the complex character of the government, being partly National and partly Federal, he proceeds to say (page 265 Towson's Ed.): 'In this relation, then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and *leaves to the several States a residuary and inviolable sovereignty over all other objects.*' * * *

"It was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government; its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments. And it is upon the principle of the perfect

independence of this Court, that in cases where the Constitution gives its original jurisdiction, the action of Congress has not deemed necessary to regulate its exercise, or to prescribe the process to be used to bring the parties before the court, or to carry its judgment into execution. The jurisdiction and judicial power being vested in the court, it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the court in this respect.

* * *

"The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI, the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth Amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. *The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument.* And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question."

There may be added the statement of Mr. Justice Brewer in the case of *In re Heff*, 197 U. S. 488, 505 (1905): "In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one

of the chief functions of this Court is to preserve the balance between them, protecting each in the power it possesses, and preventing any trespass thereon by the other." Mr. Justice Brewer expressed the same view in the later case of *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905):

> "We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme and in respect to them *the National Government is powerless*. To preserve the even balance between these two governmnts and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty."

(4) Propriety of State Action.

As set forth in the brief of the complainant upon the motion to file, the defendants without any warrant in law are exerting an authority over the internal affairs of the State of Rhode Island that is in defiance of those original and inherent powers of the State, never delegated, but reserved under the Constitution. The defendants are interfering with the exercise of those powers and with the functions of State government. "Bound hand and foot by the prohibitions of the Constitution, a complainant State can neither treat, agree, or fight with its adversary." Under these circumstances it is the highest right and duty of the State as a matter of self-preservation to assert its authority and seek to maintain it in this Court. Where, as

in this case, the wrongs are threatened by officials of the Federal Government who are beyond the territorial boundaries of the State this tribunal is not merely the proper, but the only tribunal in which the authority of the State may be vindicated.

In re Debs, 158 U. S. 564, (1895) on a petition for a writ of habeas corpus brought by the defendant Debs to relieve him from imprisonment for contempt, after having disobeyed an injunction forbidding interference with trains carrying the mails, the defendant contended that the United States had no standing in a court of equity and that therefore the injunction was invalid. Mr. Justice Brewer, in delivering the opinion of the Court, said:

> "Neither can it be doubted that the government has such an interest in the subject matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property and the government has no property interest. A sufficient reply is that the United States have a property in the mails. * * *"
>
> "We do not care to place our decision upon this ground alone. Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interests of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

That it is as important for a State government to seek assistance from the Court in the exercise of its powers and the discharge of its duties as it is for the Federal Govern-

ment, was clearly indicated by Mr. Justice Day in *Hammer v. Dagenhart*, 247 U. S. 251, 275, (1917):

> *"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.*
>
> "In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government."

The State, however, has a further interest in this suit. It not only seeks to prevent an interruption in the exercise of its governmental powers, but also seeks the protection which this Court may afford by injunctive relief from irreparable damage to its property interests. The State and its subdivisions have already lost considerable sums by the refusal of its citizens to take out licenses for the sale of non-intoxicating liquors, said non-intoxicating liquors under the laws of the State of Rhode Island being intoxicating liquors under the so-called Volstead Act. The refusal to take out said licenses is due to fear of fines and penalties under the provisions of the so-called Volstead Act and in consequence of the threats of the defendants to enforce said Act although unconstitutional and void. The State and its subdivisions will continue to lose large sums aggregating more than six hundred thousand dollars per year. The State will also suffer serious losses in its income from taxes on ratable property, which it has by its laws permitted to be created and to

exist within the State under its protection. This property damage, however, the defendants contend is remote and indirect. They even assert that there is no deprivation of property or property rights because the State is not deprived of a fund now existing or to which its right has already accrued. Such a limited view of the scope of equitable jurisdiction and relief is entirely at variance with the recent decisions of this Court.

In the case of *Hammer* v. *Dagenhart*, *supra*, a bill was filed in the United States District Court for the western district of North Carolina by a father in his own behalf, as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employes in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of an Act of Congress, intended to prevent interstate commerce in the production of child labor. The suit was directed against the United States Attorney. The District Court held the act unconstitutional, and entered a decree enjoining its enforcement. The cause came to this Court on appeal and the decree of the District Court was here affirmed. The only property interest protected by equity was the right of continuing in an employment undisturbed by enforcement of an unconstitutional act.

The case of *Traux* v. *Raich*, 239 U. S. 33, (1915) is of a similar nature. The State of Arizona passed a law providing that no employer of more than five workers shall employ not less than eighty per cent of qualified electors or native-born citizens. The appellee was a native of Austria and an inhabitant of Arizona, but not a qualified elector. He was employed as a cook by the appellant, Traux. Traux had nine employes, of whom seven were neither native-born citizens of the United States or qualified electors. The appel-

lee was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon the appellee filed his bill in the District Court of the United States for the District of Arizona to enjoin the Attorney General of the State of Arizona from enforcing the act. The bill sought a decree declaring the act to be unconstitutional and restraining procedure thereunder. The District Court enjoined the defendants from enforcing the act and on appeal to this Court the decree of the District Court was affirmed. In reference to the claim of the appellants that the bill did not state facts sufficient to constitute a cause of action in equity, Mr. Justice Hughes, delivering the opinion of the Court, said:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one of the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." . . .
>
> "It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162); that is, that

the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

In discussing the basis of equitable jurisdiction in the recent case of *International News Service* v. *Associated Press*, 248 U. S. 236, (1918) the Supreme Court said:

"In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of pecuniary nature as a property right * * * and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

Hammer v. *Dagenhart*, 247 U. S. 251 (1918).

Wilson v. *New*, 243 U. S. 332 (1917).

Traux v. *Raich*, 239 U. S. 33 (1915).

Dobbins v. *Los Angeles*, 195 U. S. 223 (1904).

The State of Rhode Island is a party in interest in this suit not only for the protection of its governmental and property rights in its corporate capacity, but it also has an

interest and a duty to all its citizens to secure to them their common rights whenever the action complained of affects the public at large. This suit therefore is brought not only on behalf of the State, but also on behalf of the people of the State. This interest in the people of the State rests upon the obligation to protect all the citizens of the State in the unrestricted exercise and free enjoyment of all those rights and privileges to which they are entitled. The State in thus acting as trustee, guardian or representative of all the people has an interest in the matter at issue, even if it had itself no pecuniary or property rights of its own involved.

In *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) an original bill in equity was brought by the State of Georgia to enjoin a foreign corporation from discharging noxious gases from its works in Tennessee over large tracts of territory in Georgia. The bill alleged that the noxious gases worked a wholesale destruction of forests, orchards and crops, and that other injuries resulted and were threatened. The jurisdiction was sustained and an injunction granted by this Court. Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity as quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests, and its inhabitants shall breathe pure

air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner, is *merely a makeweight*, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads. * * *

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulties of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. *The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law.*"

The view that it is the duty of the Nation or State to enforce the common rights of its citizens is expressed in the case of *In re Debs*, 158 U. S. 564 (1895). Mr. Justice Brewer there remarked:

> "It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individuals or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large and are in respect of matters which by the Constitution are intrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or to prevent it from taking measures therein to fully discharge those constitutional duties."

A State holds in trust the public interests of its citizens, and where it seeks to fulfil its obligation under that trust

by injunctive process, a pecuniary interest of the State in the relief sought is not essential. It is enough if there be an interest or concern arising out of the obligation to those for whose benefit the suit is brought. Mr. Justice Van Devanter in *United States* v. *New Orleans Pacific Railway Co.*, 248 U. S. 507 (1919).

The General Assembly of Rhode Island regarded the proposal by Congress of the so-called Amendment as revolutionary and usurpatory and refused to entertain it. In view of its oppressive character the Legislature directed this action with the purpose of protecting and defending the sovereign powers of the State and the liberty and independence of its people. The States of the Union stand upon an equality. Rhode Island seeks no advantage peculiar to itself, but only that protection to which every State is entitled under the Constitution. It acts in the only way in which it may act through its legislative body and legal officers, and while its course, like the occasion of it, may be without precedent, it is not without the highest constitutional sanction.

The situation which has arisen through the usurpation of power by Congress was feared from the beginning, although the particular guise under which it has been brought about was not anticipated. When the adoption of the Constitution was under discussion the State governments were regarded as the natural barrier between the liberties of the people and any invasion which might be attempted by the general government. "Every new power given to Congress," said Mr. Nicholas of Virginia, "is taken from the State Legislatures; they will be, therefore, very watchful over them (Congress); for, should they exercise any power not vested in them, it will be a usurpation of the rights of the different State Legislatures, who would sound the alarm to the people." El. Deb., Vol. 3, p. 18. Mr. Ames

of Massachusetts observed: "The state governments represent the wishes, and feelings, and local interests, of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights." El. Deb., Vol. 2, p. 46. "If there should be a usurpation," said Mr. Parsons of Massachusetts, "it will be upon thirteen legislatures, completely organized, possessed of the confidence of the people, and having the means, as well as inclination, successfully to oppose it. Under these circumstances, none but madmen would attempt a usurpation, but, sir, the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance." El. Deb., Vol. 2, p. 94.

The propriety of state action in the manner here pursued is clearly indicated by Mr. Hamilton in several of his arguments before the New York Convention. Elliot's Debates, Vol. 2.

> "The most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays of treachery. They will institute regular modes of inquiry. The complicated domestic attachments, which subsist between the state legislatures and their electors, will ever make them vigilant guardians of the people's rights." p. 266.
>
> "The people have an obvious and powerful protection in their state governments. Should any thing dangerous be attempted, these bodies of perpetual observation will be capable of forming and conducting plans of regular opposition. Can we suppose the people's love

of liberty will not, under the incitement of their legislative leaders, be roused into resistance, and the madness of tyranny be extinguished at a blow? Sir, *the danger is too distant; it is beyond all rational calculations.*" p. 253.

"Whenever Congress shall meditate any infringement of the state constitutions, the great body of the people will naturally take part with their domestic representatives. Can the general government withstand such a united opposition? *Will the people suffer themselves to be stripped of their privileges? Will they suffer their legislatures to be reduced to a shadow and a name? The idea is shocking to common sense.*" p. 304.

The people of Rhode Island, therefore, with the same love of liberty and independence as animated the Fathers of the Republic, seek in this only orderly way available to resist usurpation and to maintain the principles of the Constitution in all their vigor and guard them from the destructive influence of a despotism that is no less hateful and oppressive because of its pretended benevolence.

(5) The Issue.

The State of Rhode Island seeks to enjoin within its territorial limits the enforcement of the Volstead Act. The title "Volstead Act," as herein used, refers only to those portions of that Act which were designed to carry into effect the so-called Eighteenth Amendment. The other portions, enacted under the war powers of Congress, have no connection with this cause. The complainant avers that the Volstead Act is unconstitutional, not because of its drastic and summary provisions, but on the ground that Congress had no authority whatever to legislate upon the subject matter for

times of peace. Congress exercised that authority upon the assumption that the so-called Eighteenth Amendment was valid. If the so-called Amendment is invalid, the Volstead Act, so far as it applied to that Amendment, has no sanction in law. This brief, therefore, is limited to the contention that the so-called Amendment is invalid.

Neither time nor space will permit a discussion of all the objections that might be raised to the so-called Amendment; and yet some of the objections to it, not dealt with in this brief, are so serious that they should not be overlooked in reaching a just estimate of its constitutional standing and value. The attention of the Court may be called to the following apparent defects, thus briefly stated: that the so-called Amendment is in form a municipal regulation, an enactment of law; that it is merely a regulation of personal conduct; that it has no relation to any article or section of the Constitution, nor to any power delegated thereby, nor to any object or purpose expressed therein; that it has no reference to the structure of government and does not involve any political principle; that it converts the amending function into a legislative power and thus conflicts with Article I, Section 1, of the Constitution; that in the provision that Congress and the several States shall have "concurrent power" to enforce the article, it creates a conflict between sovereignties that are independent and separate; that in the provision limiting ratification within seven years, it imposes an unconstitutional restriction upon the Legislatures; that instead of amending the Federal Constitution, it amends the Constitution of every State in the Union without the consent of the people thereof.

Without waiving the privilege of urging in argument any ground of invalidity, the State of Rhode Island prefers to contest the issue in its more fundamental aspect, that the

so-called Amendment is a direct invasion of the jurisdiction and powers of the State and of the rights of its people, and is wholly unauthorized by the amending clause of the Constitution. The first section of the so-called Amendment reads: "After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the *United States* and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited." If the provisions of this first section were intended to apply to the territory over which the United States has territorial jurisdiction, with reference to the power exercised and the subject matter regulated, no exception could be taken by a State in regard thereto. The United States, however, has no territorial jurisdiction within a State, either in respect to the power exercised or in respect to the subject matter regulated by the so-called Amendment. It has such jurisdiction under the Constitution only in the District of Columbia, in the territories and insular possessions. The propaganda in connection with the alleged proposal by Congress and the alleged ratification by the Legislatures, and the provisions of the so-called Amendment as a whole make it clear that the term, "United States," was intended to be and is construed as including the territory of all the States as subject to the jurisdiction of the United States in respect to the power exercised and the subject matter regulated. The purpose, therefore, of this so-called Amendment is to impose federal authority, within the territorial limits of the States, over a subject matter that is inseparable from territorial sovereignty, although the execution of this purpose involves stripping the respective States and the sovereign people thereof of a power and of a discretion in the exercise of that power that they have possessed and enjoyed as

inalienable from the beginning. The right of self-government is impaired, and self-government is liberty.

Whether this so-called Amendment is valid depends upon the construction of Article V, which reads in part as follows:

> "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendment to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; * * *."

If the position of the defendants, relating to the merits of the controversy, is correctly understood from the brief filed and the arguments advanced in opposing the motion for leave to file the bill, it is substantially this:

First. The defendants contend that the amending function of Congress and the Legislatures of three-fourths of the States is a substantive power.

To this the complainant makes answer that the amending function of Congress and the Legislatures of three-fourths of the States is not a substantive power. Amending a constitution is not a purpose nor an end of government. Government is not instituted nor powers delegated that they may be corrected. The amending function is merely an incident, an accompaniment to the framing of the Constitution. It was not regarded as a legislative, executive or judicial power, nor classed with those substantive powers in Articles I, II, and III, of the original Constitution. Its place in Article V, at the end of all delegated powers, is not without significance. It indicates that it is an appurtenance to what

precedes; a precautionary safeguard to insure that the great ends to be attained, as set forth in the instrument itself, should not be defeated by unintentional error committed in the process. Had Article V been omitted altogether, the structure of government would have still been complete and its operation assured. With such an omission an amendatory function might have been inferred as an incident to the powers delegated, in order that the purpose of the instrument might not be defeated. In fact, so non-essential did this amendatory provision appear to some of the members of the Federal Convention that it was moved to strike out Article V altogether from the draft. *Farrand,* Fed. Conv., Vol. 2, p. 630.

Second. The defendants contend that an "amendment to this Constitution" means any addition to, subtraction from, change in, alteration or revision of this Constitution.

To this the complainant makes answer that an amendment to this Constitution does not mean any addition to, subtraction from, change in, or alteration or revision of this Constitution. Such a meaning cannot be gathered either from any analytical definition nor from any proper construction of the instrument. Such an interpretation renders the word "amendment" meaningless and of no intendment, and in effect eliminates it. Had there been any purpose to authorize Congress and the Legislatures of three-fourths of the States, mere officials, to add to, subtract from, change, alter, or revise the Constitution, so authoritatively established by the people, Article V would have clearly expressed that intent by including those terms. The word "amendment" is a technical word of common law significance and means simply "the correction of an error committed in a process." Amendments are thus limited to the correction of errors committed in the framing of the Constitution. It is

the only word that is appropriate in connection with an instrument of limited scope, powers and jurisdiction.

Third. The defendants contend that the amending function as a substantive power is unlimited, with the single exception "that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To this the complainant makes answer that the amending function is limited, both by its nature and by other constitutional limitations. The exceptions set forth in the original instrument "that no amendment, which may be made prior to the year one thousand eight hundred and eight, which in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate," are exceptions from a class to which amendments applied. That class included all articles and sections of the Constitution. The amending function properly construed is unlimited as to them, with the exceptions as stated.

Fourth. The defendants contend that if this Court should determine that a proposal by Congress of an "amendment to this Constitution," as above defined, was not a proposal of an "amendment to this Constitution" within the purview of Article V, it would be equivalent to the assumption of a veto by this Court upon an unlimited power of Congress.

To this the complainant makes answer that it is the province of this Court to interpret and construe the Constitution of the United States. Congress is the creature and not the creator of the Constitution. If this Court may not interpret the words and construe the clauses in Article V, then Congress and the Legislatures of three-fourths of the States, mere officials, may ignore all constitutional limi-

tations and may exert the powers of complete sovereignty. Usurpation may thrive unchecked.

Fifth. The defendants contend that whatever the proposal by Congress, whether an addition to, a subtraction from, a change in, or an alteration or revision of this Constitution, the fact that Congress has made such proposal constitutes it *ipso facto* a valid and unassailable "amendment to this Constitution;" and that, therefore, this Court has no jurisdiction in any controversy respecting any proposal by Congress of a proposition as an "amendment to this Constitution," with the single exception "that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To this the complainant makes answer that Congress is not omnipotent; that a proposal by Congress is not an "amendment to this Constitution" simply because it is proposed by Congress as such; that the conclusion to which the defendants' argument leads eliminates the word "amendment" from Article V, denies the right of this Court to interpret and construe that Article, and in effect overthrows every constitutional restraint that was designed to protect the State or the individual. Such a view of the amending function can only lead to tyranny and oppression. It is the clear duty of this Court to keep Congress in its proposals of "amendment to this Constitution" within the scope and jurisdiction of federal authority, and by so doing maintain that line of division between the Federal and State powers, which was so clearly marked out by the Constitution and which has for so many years ensured the harmonious operation of our dual system of government,—ordained and established as perpetual.

The theory of amendment which the defendants thus present is new in constitutional law. That it has been

pressed so far compels consideration and necessitates refutation. It could not have been deduced from any decisions of this Court, nor from any other authoritative source. It arises solely from the requirements of the case at issue, for the nature of the so-called Amendment is such that nothing short of the extreme view here advanced could justify or support it. The doctrine is so subversive of fundamental principles that its acceptance would bring about a constitutional revolution. It would convert the sovereignty of the people into a sovereignty of officials. It would endanger the guaranties of civil liberty and of those innumerable rights that have been inherited from the common law since the time of Magna Charta. Under its application the boundary established by the Constitution between Federal and State authority could be shifted at will, as officials might be influenced by political cowardice or expediency. In fact, all power might be absorbed by the Federal Government and the States become dependencies, States only in name, for the mere purpose of having equal representation in the Senate. This cause, therefore, will serve its purpose if it brings to the attention of this Court the serious danger that threatens the cherished principles of the Constitution and the perpetuity of free government thereunder.

(6) Established Principles.

As preliminary to a discussion of that particular article (Article V) upon which the defendants rest their doctrine that the Federal Government, by the amending function, may invade the powers and jurisdiction of a State government, it may be well to consider what deductions may be fairly drawn from the origin and nature of the Constitution and the relations which were established thereunder between

Nation and State. We are not led to this consideration by any doubt or uncertainty as to the principles to be deduced therefrom, for these principles have long been recognized and heretofore regarded as controlling. The fact that defendants' doctrine runs counter to them necessitates some inquiry as to their validity and binding force.

The assertion by the American colonies that they of right possessed full legislative powers in all matters and concerns relating to their internal affairs and the denial of these rights by the Crown and Parliament brought about the Revolution. Mr. Madison said in his Report on the Virginia Resolutions:

> "The fundamental principle of the revolution was, that the colonies were coordinate members with each other, and with Great Britain, of an empire united by a common executive sovereign but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British Parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution." *El. Deb.*, Vol. 4, p. 562.

The General Assembly of the Colony of Rhode Island severed all connection with the Mother Country on the 4th day of May, 1776, by virtue of an act providing "that in all commissions for officers, civil and military; and in all writs and processes in law, whether original, judicial or executory, civil or criminal, wherever the name and authority of the said King (George III) is made use of, the same shall be omitted; and in the room thereof, the name and authority of the Governor and Company of this colony, shall be sub-

stituted, in the following words, to wit: 'The Governor and Company of the English Colony of Rhode Island and Providence Plantations.'" The other colonies took the same course and on the 4th day of July, 1776, the United States, in Congress assembled, declared the thirteen united colonies free and independent States. In *Ware* v. *Hylton*, 3 Dall. 199, 224 (1796), Mr. Justice Chase said:

> "I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, *that each of them had a right to govern itself by its own authority, and its own laws, without any controul from any other power upon earth.* * * * I have ever considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments."

In March, 1781, the several States united in a League of Friendship for the "security of their liberty" under the Articles of Confederation. Under these Articles no State surrendered or delegated any power over its internal affairs and civil institutions, and it was expressly provided by Article 2 of said Articles of Confederation that "each State retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled." In *Gibbons* v. *Ogden*, 9 Wheat, 1, 187 (1824), Mr. Chief Justice Marshall observed: "As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its con-

struction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. *This is true.*" The powers conferred upon Congress under the Articles of Confederation were chiefly those which were formerly regarded as prerogatives of the Crown and which had fallen in by the Revolution. They did not relate in any manner to the government of the internal affairs of the States, nor did they include even the right to tax or to regulate commerce, which were considered as appurtenant to legislative sovereignty.

The weaknesses of the government under the Articles of Confederation soon became manifest. The central government had no authority to enforce compliance with its requisitions and the States regarded them as less obligatory after the termination of the war. Congress was powerless to comply with treaty obligations. It was beyond the scope of its authority to protect American interests by trade regulations, either foreign or between the States. Credit and confidence had been impaired by the issue of paper money. The Confederation was bankrupt and even unable to pay the interest on its foreign debt. The States were circumscribed with enemies from Maine to Georgia. Foreign aggression was feared and there was deep-seated dread of insurrection and anarchy. The defects in the system then existing were variously stated in the Federal and State conventions, and however these defects were set forth, *no reference was made to any incompetency of the States in the management of their internal and domestic affairs, nor to any design or intent of intrusting those affairs to the Federal Government.* A single quotation will suffice. Mr. Thatcher, in the Massachusetts Convention, thus described the situation:

"On the one hand, the haughty Spaniard has deprived us of the navigation of the River Mississippi; on the other, the British nation are, by extravagant duties, ruining our fishery. Our sailors are enslaved by the pirates of Algiers. Our credit is reduced to so low an ebb, that American faith is a proverbial expression for perfidy, as Punic faith was among the Romans. Thus have we suffered every species of infamy abroad, and poverty at home. Such, in fact, have been our calamities, as are enough to convince the most skeptical among us of the want of a general government, in which energy and vigor should be established, and at the same time, the rights and liberties of the people preserved. * * * In some states, laws were made directly against the treaty of peace; in others, statutes were enacted which clashed directly against any federal union; new lands sufficient to discharge a great part of the Continental debt intruded upon by needy adventurers; our frontier settlements exposed to the ravages of the Indians; while the several states were unable or unwilling to relieve their distress. Lay all those circumstances together, and you will find some apology for those gentlemen who framed this Constitution. I trust you may charitably assign other motives for their conduct, than a design to enslave their country, and to parcel out for themselves its honors and emoluments." El. Deb., Vol. 2, pp. 143, 144.

It is generally recognized that necessity alone brought the statesmen together at Philadelphia, and occasioned the abandonment of a system that had proven so defective and the creation of a new form of government. The task was prodigious. The prevailing temper of the time cannot be overlooked. "It is universally understood, it is a part of the history of the day," remarked Mr. Chief Justice Marshall, in *Barron* v. *Baltimore,* 7 Pet. 243, 250 (1833), "that the great revolution which established the Constitution of the United States was not effected without immense opposi-

tion. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty." In the Pennsylvania Convention, Mr. Wilson, afterwards Mr. Justice Wilson of this Court, remarked: "The citizens of the United States, however different in some other respects, are well known to agree in one strongly-marked feature of their character,—a warm and keen sense of freedom and independence. This sense has been heightened by the glorious result of their late struggle against all the efforts of one of the most powerful nations of Europe. It was apprehended, I believe, by some, that a people so highly spirited would ill brook the restraints of an efficient government." El. Deb., Vol. 2, p. 420.

(A) All Sovereignty Resides in the People.

There is no principle better established than that our governments in Nation and State are governments of the people. The people possess all sovereign power. Constitutional government is based upon such power as the people have designated shall be exercised by their representatives under written instruments. The Federal Constitution therefore was submitted for ratification directly to conventions to be chosen by the people. The Legislatures were regarded as incompetent to act. The principle was clearly stated by Col. Mason and Mr. Madison in the course of debate upon the question of submission.

> "Col. Mason considered a reference of the plan to the authority of the people as one of the most important

and essential of the resolutions. The legislatures have no power to ratify it. They are the mere creatures of the state constitutions, and cannot be greater than their creators. And he knew of no power in any of the constitutions—he knew there was no power in some of them—that could be competent to this object. Whither, then, must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that *this doctrine should be cherished, as the basis of free government.*" El. Deb., Vol. 5, p. 352.

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and *it would be a novel and dangerous doctrine, that a legislature could change the constitution under which it held its existence.* There might indeed be some constitutions within the Union, which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *constitution.*" El. Deb., Vol. 5, p. 355.

That all authority is derived from the people was early expressed by Mr. Chief Justice Marshall, in the case of *McCulloch* v. *Maryland*, 4 Wheat 316, 403 (1819), and although the principle is clear, his expression of it may be recalled:

> "The convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a

convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? *No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State Governments.

"From these Conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. *It required not the affirmance, and could not be negatived, by the State governments.*" . . .

"But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, *the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.* The government of the Union, then (whatever may be the influence of this fact on the case) is, emphatically, and truly, a government of the people. In form and

substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

(B) The Federal Government Limited to Prevent Encroachments.

The submission of the Constitution to the people met the strongest opposition and divided the country into two great parties. Their differences turned chiefly on the construction of the instrument. The Federalists claimed that the Constitution was a special delegation of power, differing from the State constitutions in which the delegation was general; that the Federal Government could exercise only such powers as were expressly delegated; that the people of a State would be affected only so far as they were restrained by the instrument or their powers surrendered therein by express delegation. The Anti-Federalists replied that while the intent might have been to create a limited government, the document itself did not so declare; that the powers delegated to the Federal Government might be broadly construed, and through construction and implication, encroachment might take place upon the sovereign powers of the people of a State; that amendments were necessary to place express limitations upon the Federal Government and to mark the boundaries which should separate Federal and State authority; and therefore they insisted that a bill of rights should be incorporated into the instrument, "bill of rights" being the familiar term for limitations and restraints upon government.

A definite limitation of Federal power to prevent encroachment upon State power was intended by all factions.

"This balance between the national and state governments", said Mr. Hamilton, "ought to be dwelt on with peculiar attention, as it is of the utmost importance." That this balance was absolutely essential in a dual system was well expressed by Mr. Smith in the New York convention:

> "It is necessary that the powers vested in government should be precisely defined, that the people may be able to know whether it moves in the circle of the Constitution. It is the more necessary in governments like the one under examination, because Congress here is to be considered as only a part of a complex system. The state governments are necessary for certain local purposes; the general government for national purposes. The latter ought to rest on the former, not only in its form, but in its operations. It is therefore of the highest importance that *the line of jurisdiction should be accurately drawn.*" El. Deb., Vol. 2, p. 332.

In North Carolina Mr. Iredell, speaking to this point, asserted the purpose accomplished by the enumeration of powers in the instrument:

> "In my opinion, there ought to be a line drawn, as accurately as possible, between the power which is given and that which is retained. In this system, *the line is most accurately drawn by the positive grant of the powers of the general government.*" El. Deb., Vol. 4, p. 10.

And in Pennsylvania Mr. Wilson expressed the same view:

> "Sir, I think there is another subject with regard to which this Constitution deserves approbation. I mean *the accuracy with which the line is drawn* between the powers of the general government and those of the particular state governments. * * * It is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire.

Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible." El. Deb., Vol. 2, p. 481.

In almost every convention, however, by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government,—not against those of the local governments. *Barron* v. *Baltimore*, 7 Peters, 243, 250 (1833). In the Pennsylvania Convention, Mr. Wilson, who had also been a member of the Convention which drafted the Constitution, said:

> "I cannot say, Mr. President, what were the reasons of every member of that Convention for not adding a bill of rights. I believe the truth is, that such an idea never entered the mind of many of them. I do not recollect to have heard the subject mentioned till within about three days of the time of our rising; and even then, there was no direct motion offered for any thing of the kind. I may be mistaken in this; but as far as my memory serves me, I believe it was the case. *A proposition to adopt a measure that would have supposed that we were throwing into the general government every power not expressly reserved by the people, would have been spurned at, in that house, with the greatest indignation.* * * * But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the govern-

ment, and the rights of the people would be rendered incomplete." El. Deb., Vol. 2, p. 435.

The same position was taken by Mr. Iredell, Mr. MacLaine and Mr. Johnson in North Carolina: El. Deb., Vol. 4, pp. 140, 142, 148, 160, 161; by Mr. Pitney in South Carolina: El. Deb., Vol. 4, p. 315; by Governor Bowdoin and Mr. Parsons in Massachusetts: El. Deb., Vol. 2, pp. 87, 93; by Governor Randolph, Mr. Lee and Mr. Nicholas in Virginia: El. Deb., Vol. 3, pp. 186, 203, 451, 464; and by many others. The more cautious delegates to the State conventions, however, were extremely jealous of their newly won independence and liberty and were not satisfied with the logic of the argument; and insisted that there should be no ground for any future pretense for the assumption of federal power by implication and that there should be a clear and unequivocal statement in the instrument that all powers not expressly granted were to be retained. Mr. Madison, Federalist, No. 45. In speaking to this point Mr. Spencer, in the North Carolina Convention, observed:

> "I know it is said that what is not given up to the United States will be retained by the individual states. I know it ought to be so, and should be so understood; but, sir, *it is not declared to be so.* In the Confederation it is expressly declared that all rights and powers, of any kind whatever, of the several states, which are not given up to the United States, are expressly and absolutely retained, to be enjoyed by the states. There ought to be a bill of rights, in order that those in power may not step over the boundary between the powers of government and the rights of the people, which they may do when there is nothing to prevent them. They may do so without a bill of rights; notice will not be readily taken of the encroachments of rulers, and they may go a great length before the people are alarmed. Oppression may therefore take place by degrees; but

if there were express terms and bounds laid down, when those were passed by, the people would take notice of them, and oppressions would not be carried on to such a length. I look upon it, therefore, that there ought to be something to confine the power of this government within its proper boundaries." El. Deb., Vol. 4, p. 137.

In Virginia, Mr. Henry asserted that "a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government, and that every implication should be done away with." El. Deb., Vol. 3, p. 150. In Massachusetts, Mr. Thompson inquired: "Where is the bill of rights which shall check the power of this Congress; which shall say *'Thus far shall ye come and no farther'?"* El. Deb., Vol. 2, p. 80. In Virginia, Mr. Mason declared that *artful sophistry and evasion* could not satisfy him; that he could see no clear distinction between rights relinquished by a positive grant and lost by implication; that there was a clause in the Confederation reserving to the States respectively every power, jurisdiction and right not expressly delegated to the United States, and that this clause had never been complained of, but approved by all. He further remarked:

> "We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground. We wish to give the government sufficient energy, on real republican principles; but we wish to withhold such powers as are not absolutely necessary in themselves, but are extremely dangerous. * * * *We ask such amendments as will point out what powers are reserved to the state government, and clearly discriminate between them and those which are given to the general government, so as to prevent future disputes and clashing of interests.* Grant

> us amendments like these, and we will cheerfully, with our hands and hearts, unite with those who advocate it, and we will do everything we can to support and carry it into execution." El. Deb., Vol. 3, p. 271.

The ratification of the Constitution in most of the States was accompanied by an explanatory statement that favorable action was taken in full reliance that amendments would be promptly made to meet the objections which had been raised. Of the numerous amendments proposed by the States, that relating to the limitation of federal power was deemed the most essential. Massachusetts demanded: "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised." From Maryland the proposal read: "That Congress shall exercise no power but what is expressly delegated by this Constitution." The proposal from New York was: "That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective states, to be by them exercised." From North Carolina: "That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government." From Rhode Island: "The United States shall guarantee to each state its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States." The demand of Pennsylvania was more at length:

> "That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the

Union, under color or pretense of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."

At the First Session of Congress under the new government Mr. Madison brought forward proposals of amendments to the Constitution in accordance with the assurance which he had given in the Virginia Convention. He thus carried out a tacit agreement through which ratification in several of the States had been procured. In bringing forward these amendments, he said:

"I confess it has already appeared to many, in point of candor and good faith, as well as policy, to be incumbent upon the first Legislature of the United States, at their first session, to make such alterations in the Constitution as will give satisfaction, without injuring or destroying any of its vital principles." * * *

"I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States. *Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.*" Gales & Seaton's Debates, Vol. 1, pp. 458, 733.

Under the direction of Mr. Madison twelve amendments were agreed upon and proposed to the Legislatures of the several States, the preamble of the joint resolution of submission reading:

> "The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added;* And as extending the ground of public confidence in the government, will best ensure the beneficent ends of its institution: Resolved, etc."

Of the twelve proposals submitted ten were ratified and these ten Amendments have ever been regarded as virtually a part of the original document and they have always been construed as declaratory of its meaning and as imposing a definite limitation upon the construction of its powers. The Federal Government therefore is limited not only by the enumeration of the particular powers delegated, but also by the express limitations contained in the first ten Amendments.

Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325 (1816):

> "It is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.
>
> "*These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution*, which declares, that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

"The government, then, of the United States can claim no powers which are not granted to it by the constitution, and *the powers actually granted, must be such as are expressly given, or given by necessary implication.*"

Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819):

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. *That principle is now universally admitted.*"

(C) The Federal and State Governments are Independent Sovereignties, Have Distinct and Separate Jurisdictions and Move in Entirely Different Spheres.

The constitutional limitations having been definitely established, either in the instrument itself or by Amendments, the Federal and State governments have been regarded from the beginning as distinct and separate. Their powers are for different purposes. Their territorial or objective jurisdictions are well defined. They move in entirely different spheres. Each in its sphere is independent and sovereign. The Federal Government derives its power from the people of the United States. A State government derives its power from the sovereign people of the State. As Mr. Justice Iredell, in *Chisholm* v. *Georgia*, 2 Dall. 419, 448 (1793), remarked: "A State does not owe its origin to the Government of the United States, in the highest or in any

of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people." He had previously stated in the same case (p. 435): "Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. *Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them.* Of course the part not surrendered must remain as it did before."

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 410 (1819):

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and *neither sovereign with respect to the objects committed to the other.*"

Mr. Chief Justice Taney, in *Ableman* v. *Booth*, 21 How. 506, 516 (1858):

> "The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, *as if the line of division was traced by landmarks and monuments visible to the eye.*"

Mr. Justice Bradley, in *Claflin* v. *Houseman*, 93 U. S. 130, 137 (1876):

"It is true, the sovereignties are distinct, and *neither can interfere with the proper jurisdiction of the other*, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth*, 21 How. 506."

Mr. Justice Nelson, in *Collector* v. *Day*, 11 Wall. 113, 124 (1870):

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but *the States within the limits of their powers not granted, or in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.*"

Mr. Justice Waite, in *United States* v. *Cruikshank*, 92 U. S. 542, 550 (1875):

"The people of the United States resident within

any State are subject to two governments: one State and the other National; *but there need be no conflict between the two. The powers which one possesses, the other does not.* They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad."

Mr. Justice Bradley, in *Claflin* v. *Houseman,* 93 U. S. 130, 136 (1876):

"Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject matter."

The Federal and State governments are not only distinct and separate in their objects and in the operation of their powers, but each has its own citizenship, its own electorate, its own agencies, and each is limited to its own powers and jurisdiction in securing and protecting the rights and privileges of its own people. In *United States* v. *Cruikshank, supra,* Mr. Justice Waite clearly pointed out the limitations upon the operation of each government, determined by their respective powers and jurisdiction. He there said (p. 549):

"We have in our political system a Government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-house Cases,* 16 Wall. 74.

"Citizens are the members of the political com-

munity to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. *The duty of a government to afford protection is limited always by the power it possesses for that purpose.* * * *

"Within the scope of its federal powers, as enumerated and defined, it is supreme and above the States; but *beyond, it has no existence.* It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. *It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.*"

(D) The Police Power Exclusively in the States.

"By the public police and economy," says Blackstone, "I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." Commentaries, Sharswood's Ed., Vol. 2, Bk. 4, p. 162. The police power is inseparable from territorial sovereignty and through that power a State

administers the common law with such modifications as the changing social conditions of the time demand. The common law was never incorporated in the Federal Constitution nor its administration intrusted to federal authority. Mr. Madison, the Father of the Constitution, in his elaborate Report on the Virginia Resolutions, said:

> "From the review thus taken of the situation of the American colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the Articles of Confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the federal government, and in superseding the authorities of the state governments,—the committee feel the utmost confidence in concluding that *the common law never was, nor, by any fair construction ever can be deemed a law for the American people as one community;* and they indulge the strongest expectation that the same conclusion will be finally drawn by all candid and accurate inquirers into the subject. It is, indeed, distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and *a law that would sap the foundation of the Constitution as a system of limited and specified powers.* A severer reproach could not, in the opinion of the committee, be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them." El. Deb., Vol. 4, p. 566.

As to the nature of the police power, Mr. Justice Miller, in the Slaughter-House Cases, 16 Wall. 36, 62 (1872), remarked:

> "This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. *Com. v. Alger*, 7 Cush. 84.
>
> "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.
>
> "'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.' *Thorpe v. Rutt. & B. R. R. Co.*, 27 Vt. 149. * * *
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> "In *Gibbons v. Ogden*, 9 Wheat., 203, Chief Justice Marshall, speaking of inspection laws passed by the States, says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government—*all which can be most advantageously administered by the States themselves.* Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation.'

"*The exclusive authority of state legislation over this subject* is strikingly illustrated in the case of *N. Y.* v. *Miln*, 11 Pet. 102. * * * To the same purpose are the recent cases of the *The License Tax*, 5 Wall. 471, and *U. S.* v. *Dewitt*, 9 Wall. 41."

Another illuminating definition of this power is given by Mr. Justice Gray, in *Leisy* v. *Hardin*, 135 U. S. 100, 127 (1889):

"By the Tenth Amendment, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

"Among the powers thus reserved to the several States is what is commonly called the police power—*that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime.*

" 'The police power belonging to the States in virtue of their general sovereignty,' says Mr. Justice Story, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire-test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters-patent from the United States. *United States* v. *Dewitt*, 9 Wall. 41; *Patterson* v. *Kentucky*, 97 U. S. 501.

"The police power includes all measures for the protection of the life, health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression

of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. *Slaughter-House Cases*, 16 Wall. 36, 62, 87; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Phalen* v. *Virginia*, 8 How. 163, 168; *Stone* v. *Mississippi*, 101 U. S. 814.

"This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is *inalienable*. As was said by Chief Justice Waite, referring to earlier decisions to the same effect, '*No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.*' *Stone* v. *Mississippi*, 101 U. S. 814, 819; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 753; *New Orleans G. Co.* v. *Louisiana L. & H. Co.*, 115 U. S. 650, 672; *New Orleans* v. *Houston*, 119 U. S. 265, 275."

"The police of a State," says Judge Cooley, "embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." The same author adds: "In the American constitutional system, the power to establish the ordinary regulations of police has been left

to individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States.* *U. S.* v. *Dewitt*, 9 Wall. 41; *U. S.* v. *Reese*, 92 U. S. 214; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Keller* v. *U. S.*, 213 U. S. 138." Cooley, Const. Lim., 7th Ed., pp. 829, 831.

This police power of a State has been particularly sustained in its application to the manufacture, sale and transportation of the subject matter of the so-called Amendment, and it has been repeatedly held to be an absolute and exclusive power in the State.

Crane v. *Campbell*, 245 U. S. 304 (1917).
Purity Extract Co. v. *Lynch*, 226 U. S. 192 (1912).
Crowley v. *Christensen*, 137 U. S. 86 (1890).
Kidd v. Pearson, 128 U. S. 1 (1888).
Mugler v. *Kansas*, 123 U. S. 623 (1887).
Beer Co. v. *Mass.*, 97 U. S. 25 (1878).
Bartemeyer v. *Iowa*, 18 Wall. 129 (1874).

Mr. Chief Justice Chase, in speaking of the internal commerce and domestic trade of a State, in the *License Tax Cases*, 5 Wall. 462, 470 (1866), said:

> "Over this commerce and trade (the internal commerce and domestic trade of the States) Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the Legislature. *The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject.*"

Mr. Justice Matthews, in *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U. S. 465, 493 (1888):

> "It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution.

Mr. Justice Lamar, in *Kidd* v. *Pearson*, 128 U. S. 1, 23 (1888):

> "We have seen that whether a State in the exercise of its *undisputed* power of local administration, can enact a Statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, *is not longer an open question before this Court.*"

In *Leisy* v. *Hardin*, 135 U. S. 100, 122 (1889), Mr. Chief Justice Fuller, in delivering the opinion of the Court, remarked:

> "These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government. * * *
>
> "Undoubtedly, it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may

properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety. * * *"

Mr. Justice Gray, in dissenting in *Leisy* v. *Hardin*, *supra*, but not with reference to the principle here discussed, said:

"The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the Legislatures of the several States, and can be judiciously and effectively exercised *by them alone*, according to their views of public policy and local needs; and *cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.*"

Mr. Justice Brewer, in *In re Heff*, 197 U. S. 489, 505 (1905), speaking for the Court, remarked:

"The general police power is reserved to the States, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And *so far as it is an exercise of the police power it is within the domain of State jurisdiction.*"

(E) No Police Power in Federal Government.

Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments, or produce any conflict between the two governments in the exercise of their respective powers,

need occur. There is always a division line between a Federal and a State power. As Mr. Chief Justice Marshall said in *Gibbons* v. *Ogden, supra*:

> "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

Thus Congress under its power to regulate commerce between the States has enacted:

> (a) The Wilson Act (4 Fed. Stat. Ann. 2d ed., p. 585; U. S. Statutes, August 8, 1890), sustained in *In re Rahrer,* 140 U. S. 545;
>
> (b) The Webb-Kenyon Act (1914 Sup. to Fed. Stats. Ann., p. 208; 4 Fed. Stats. Ann., 2d ed., p. 593; March 1, 1913), sustained in *James Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; and
>
> (c) The Reed Amendment (U. S. Fed. Stat. Ann. 1918 Supp., p. 394; Sec. 5 of Act of March 3, 1917. See *McAdams* v. *Wells Fargo & Co.,* 249 Fed. 175; *U. S.* v. *Mitchell,* 245 Fed. 601.

This legislation could only be supported under the power of Congress to regulate interstate commerce. In each case there was a clear intent to recognize the right of the State to exercise its police power to the full and to furnish every federal assistance to that end. But Congress has no police power and may not regulate the subject matter. Its legislation may effect the subject matter indirectly through its power over interstate commerce. But the police power resides with the States alone, as Mr. Justice Harlan re-

marked in the case of *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 628 (1898):

> "This Court, while sustaining the power of Congress to regulate commerce among the States, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with Acts of Congress passed in pursuance of that instrument."

In the case of *In re Heff*, 197 U. S. 489 (1905), where it was held that Congress could not penalize the sale of liquor within a State to an Indian who had acquired the privilege of State citizenship, Mr. Justice Brewer, in delivering the opinion of the Court, said:

> "It will not be doubted that an Act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. *There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two.*" p. 505.

It is beyond dispute that the police power is not one of the enumerated powers delegated to the Federal Government by the Constitution. It is a power inherent in the State which has never been surrendered. It is indispensable to community government and inseparable from territorial sovereignty. In the recent case of *Hamilton* v. *Kentucky D. & W. Co.*, (Dec. 1919), Mr. Justice Brandeis said:

> "*That the United States lacks the police power and*

that this was reserved to the States by the Tenth Amendment is true."

Keller v. *United States*, 213 U. S. 138 (1908);
United States v. *Dewitt*, 9 Wall. 41 (1870).

(7) Article V Should be Construed as Consistent with These Principles.

The foregoing principles, which have been deduced by this Court from the origin and nature of the Constitution and the relations which were established thereunder between the Federal and State governments, can no longer be regarded as permanent if the doctrine which is advanced by the defendants in this cause be accepted as correct. The first ten Amendments were positive limitations upon all federal powers under the Constitution. If the amending function in Article V is not subject to the limitation of the Tenth Amendment, it is no more subject to the limitations of the first nine Amendments. Of what value then are all those rights, secured to the individual under the constitution of a State? Rhode Island first established the principle of religious liberty, and that principle may be threatened. Under the guise of amending the Constitution, Congress and the Legislatures of three-fourths of the States may abridge the freedom of speech and of the press, and the right of assembly, and of petition for redress of grievances; may violate the right of the individual to be secure in his person and effects against unreasonable searches and seizures; may introduce the most summary processes and proceedings in criminal cases and ignore every right of an accused; and may even deprive one of life, liberty or property without due process of law, and take private property for public use

without just compensation. If the amending function is limited by some of these first ten Amendments and not by others of them, where is the line to be drawn? And if no line can be drawn, then all the first ten Amendments are limitations upon the amending function, or none of them are.

The defendants in urging that Article V should be construed as delegating a substantive power to add to, subtract from, change, alter, or revise this Constitution upon any proposal by Congress, ignore the historical travel of constitutional development. They entirely misconceive the plan and scope and purpose of the Federal Constitution. Their theory would result in the overthrow of all those barriers that were so wisely erected for the protection of civil liberty. Even the present application of the doctrine fundamentally alters the relation of the States to the Federal Government, and even threatens the existence and autonomy of the States, for any government whose powers are subject to the control of another and distinct government can exist only at the mercy of that other government. "Without the States in union there could be no such political body as the United States."

A construction therefore of Article V which would give support to the doctrine which the defendants advance would not only run counter to the views heretofore entertained by our Courts and jurists, but would definitely tend to the destruction of the States, and thereby of the Union itself. In this connection we may quote the apt words of Mr. Justice Miller, in the *Slaughterhouse Cases, supra*:

> "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these

consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

We are not wholly dependent however in this case upon the argument drawn from the consequences of defendants' doctrine. Strong as that argument is, there are others equally cogent. There is nothing in the wording of Article V which directly provides that the powers reserved to the States are subject to the control of the Federal Government through the process of amendment; nor is there anything in Article V, or in any other part of the Constitution from which may be inferred such an inconsistent and extraordinary purpose. All reasoning and all deductions are to the contrary. If the amending function in the Federal Constitution had any relation to the constitutions of the several States or to the powers which were reserved to the several States, words would have been employed in Article V clearly and directly to express that intent. Mr. Chief Justice Marshall pointed out in *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), that wherever in the original Constitution there was an inhibition intended to act on State powers, words were employed which directly expressed that intent. That case involved the contention that certain state legislation was in violation of the Fifth Amendment to the Federal Constitution. Holding that that Amendment

was a limitation upon the Federal and not upon the State governments and that the same rule of construction should be applied to the Amendments as to the original Constitution, the Chief Justice said:

> "It would be tedious to recapitulate the several limitations on the power of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. *The question of their application to States is not left to construction. It is averred in positive words.*
>
> "If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; if *in every inhibition intended to act on State power, words are employed which directly express that intent*, some strong reason must be assigned for departing from this same and judicious course in framing the amendments, before that departure can be assumed. We search in vain for that reason.
>
> "Had the people of the several States, or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, *the remedy was in their own hands*, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. *The unwieldly and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself.* Had the framers of these amendments intended them to be limitations on the powers of the State governments *they*

would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." p. 249.

The framers of the Constitution, however, did not leave such an important matter in doubt. We indulge in the confidence that a fair and natural construction of the provisions of Article V will lead to a complete refutation of defendants' theory that the Federal Government, through the amending function, may invade the powers and jurisdictions of the States.

(8) The So-called Eighteenth Amendment is Not an Amendment Within the Purview of Article V.

Mr. Justice Brewer, in delivering the opinion of the court, in the case of *South Carolina* v. *United States*, 199 U. S. 435, 447, (1905) said:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still

within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Scott* v. *Sandford*, 19 How. 393, 426:

"'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

"It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them; putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, well declared:

"'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.'

After quoting the above passage from the case of *Gibbons* v. *Ogden*, in his work on Constitutional Limitations, 7th Ed., p. 93, Judge Cooley remarks:

"This is but saying that no forced or unnatural construction is to be put on their language; and it seems so obvious a truism that one expects to see it

universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim."

(A) Selection of the Word Amendment by Mr. Madison.

The principle of amendment in the Federal Constitution originated in the thirteenth resolution of the Virginia Plan. *Farrand,* Vol. 1, p. 22. The Virginia Plan was drafted by Mr. Madison after months of labor prior to the assembling of the delegates at Philadelphia. *Taylor*: Origin and Growth of Am. Const., pp. 550-561. It was presented to the Convention by Governor Randolph, as the head of the Virginia delegation. It consisted of a set of resolutions, the thirteenth of which read as follows: "That provision ought to be made for the *amendment* of the Articles of Union whensoever it shall seem necessary." In passing, it may be pointed out that it was the particular Articles of Union that were to be amended. The sense was not changed when later the words "this Constitution" were substituted for "Articles of Union." The word *amendment* was so fully understood as to its import and apparently regarded as so appropriate to the context, that during the weeks of debate in which every word and phrase was scrutinized, no criticism was passed upon it. There is no evidence that any other word or words were considered in this connection. There was before the Committee of Detail a document in the handwriting of Governor Randolph which employed the phrase "alter or revise", but no change was reported by the Committee of Detail. *Farrand,* Vol. 2, pp. 137, 148. The exist-

ence of this document furnishes ample proof that its author did not draft the Virginia Plan in which *amendment* was more accurately and understandingly used.

The principle of amendment was not new in American Constitutions. There were several precedents which undoubtedly served as a guide, both in the preparation of the Virginia Plan and in the discussion of it in Convention. As early as 1683 the Pennsylvania Frame of Government and the Pennsylvania Act of Settlement contained within themselves a provision for modification. A similar provision was incorporated in the Pennsylvania Frame of Government of 1696 and in the Pennsylvania Charter of Privileges of 1701. In each case the instrument provided that it should not be "altered, changed or diminished" without the consent of the Governor and six parts of seven of the Assembly.

Immediately after the Declaration of Independence all of the colonies, except Connecticut and Rhode Island, adopted new written Constitutions and in several of them provision was made in some form for modification of the instrument without entire revision. These Constitutions undoubtedly furnished a precedent for incorporating Article V in the Federal Constitution. The Constitutions of North Carolina of 1776, of New Jersey of 1776, of New Hampshire of 1776, and of South Carolina of 1776 contain no provision for change or amendment. In the Maryland Constitution of 1776 (Article 59) the words were "altered, changed or abolished". *Poore*, Vol. 1, pp. 817, 829. In the Delaware Constitution of 1776 (Article 30) the phrase was "altered, changed or diminished". *Poore*, Vol. 1, pp. 273, 278. The Constitution of George, adopted in 1777 (Article 63), provided only for "alterations". *Poore*, Vol. 1, pp. 377, 383. The South Carolina Constitution of 1778 (Article 44) uses the words "alter" and "change" in the same sense. Of more

direct bearing, however, than the preceding were the Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780. The provision of the former was copied in the Vermont Constitution of 1777, (*Poore,* Vol. 2, pp. 1857, 1865), and in the succeeding Vermont Constitutions of 1786 and 1793. The provision in the Massachusetts Constitution of 1780 was copied in the New Hampshire Constitution of 1784. *Poore,* Vol. 2, pp. 1280, 1293.

The Pennsylvania Constitution of 1776 provided for the election of a Council of Censors in every seventh year, composed of two persons in every city and county. Among the powers of this council was the following:

> "The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them *an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people*: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject." *Poore,* Vol. 2, pp. 1540, 1548.

This Pennsylvania Constitution makes a sharp distinction between amendments, additions and explanatory provisions. It also clearly indicates that amendments were to apply to the particular articles of the Constitution and that the amending function was not a matter of speculation, outside of the instrument and unrelated to it.

The Massachusetts Constitution of 1780, in Chapter 6, Article 10, provided:

"In order the more effectually *to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary*, the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments. *Poore*, Vol. 1, pp. 956, 972.

The Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780 were the first to introduce the qualifying provision that no amendment should be made except in case of necessity. In the former the exigency was described as "an absolute necessity of amending" and in the latter "as from experience shall be found necessary." Without question the word "necessary" in Article V of the Federal Constitution had its origin in these provisions of the Pennsylvania and Massachusetts Constitutions. Benjamin Franklin, who sat in the Federal Convention, presided over the Assembly that framed the Pennsylvania Constitution of 1776.

The Articles of Confederation which became effective March 1, 1781, provided:

"The Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any *alteration*, at any time hereafter, be made in *any* of them; unless such *alteration* be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislature of every State." Article 13.

Mr. Madison, therefore, had before him in drafting the

thirteenth resolution of the Virginia Plan and the delegates at Philadelphia had before them in considering and discussing that resolution the following words which had been employed in amendatory provisions of prior Constitutions: "amend", "alter", "change", "diminish", "abolish", "add", "explain" and "revise". It would appear pedantic to define and distinguish words of such diverse origin and different shades of meaning. A resort to any lexicon would suffice. The framers of the Constitution, having before them examples of the use of so many words of distinguishable conception, selected that word as expressive of their intent which was of them all the only one applicable to a limited Constitution. If "alter", "change", "diminish", "abolish", "add", "explain" and "revise" are words of broader and larger meaning, it is sufficient to say that neither this Court nor Congress can substitute either of those words for a word of more limited meaning used in the Constitution. As Mr. Chief Justice Taney said in *Passenger Cases*, 7 How. 283, 493 (1849): "Everyone will admit that a construction which substitutes a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority."

(B) The Derivative Meaning.

The derivative meaning of *amend* may throw some light upon the correct interpretation of that word in Article V. The underlying conception which occasioned its creation in the classical period of Latin writers may be gathered from its original verbal form, *ex-mendare*, (*e* or *ex*—from or out of; and *menda*—a fault, error or mistake.) It was from the first almost exclusively used with reference to an ailment of the body or to an error or mistake in a writing. Its

primary sense was an improvement in health or the removal of a defective quality from a written instrument. It was distinctively a qualitative word, referring to an existing substantive that had in it a quality that was subject to improvement. The element of removal or taking out of an existing quality of error was essential in its proper application. An amendment, therefore, in its derivative conception implies the relation of a bad and a better quality in an existing substantive, and the removal of the bad and the substitution of the better quality. It has no reference to any change in the purpose or identity of the substantive. The purpose of a written instrument may be the measure of its defective quality, but it is only the quality that is changed and not the purpose or identity. The primary meaning of the word as used today is still the derivative meaning. In distinguishing *amend* from the other words with which it is attempted to be synonymized, it may be observed in brief that *change* and *alteration* embrace any variation, irrespective of quantity or quality; that *addition* and *subtraction* relate only to quantity; that a *revision* is a pretentious process of reviewing the whole; and that an *amendment* is qualitative and is applicable only by reference and relation.

It would be the most serious error to confound these words or to employ them indiscriminately. "The acknowledged accuracy of the language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument." Mr. Justice McKinley in *Passenger Cases,* 7 How. 283, 451 (1849).

Merely as a literary production the Constitution has been regarded as a masterpiece of correct and exact expression. The accurate scholarship of those able and learned patriots who drafted the instrument would be lightly

esteemed if we were to interpret their words with any less care and precision than they exercised in the choice of them. The selection of the word *amendment* in Article V was well considered and discriminating. It conveys an exactness of thought. Its use as a technical term in the English common law confirmed and established its derivative meaning as applied to legal documents. The common law merely gave to the term a definiteness of application.

(C) The Meaning at Common Law.

It is well known that the framers of the Constitution confined themselves so far as possible to words and phrases which had acquired by long usage in legal procedure a definite significance; and it has been said that the Constitution could not be fairly interpreted or well understood without tracing the history of such words and phrases through the succeeding stages of development of the common law.

In the case of *South Carolina* v. *United States*, 199 U. S. 437, Mr. Justice Brewer remarked:

> "One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith* v. *Alabama*, 124 U. S. 465, 478:
>
> " 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.'
>
> "And by Mr. Justice Gray in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654:
>
> " 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the

framers of the Constitution. *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent. Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274.'"

Procedure at common law in its early stage frequently defeated its own end by being governed more by the letter than by the spirit. This strict adherence to form occasioned great injustice whenever a litigant took advantage of some immaterial error committed in a pleading or process. To remedy this condition Parliament began to legislate at an early date. Cap. XI, 14 Edward III (1340) dealt with misprisions of clerks and provided that "no process shall be annulled, or discontinued, by mistaking in writing one syllable or one letter, too much or too little; but as soon as the thing is perceived, by challenge of the party, or in other manner, it shall be hastily *amended* in due form, without giving advantage to the party that challengeth the same because of such misprision." A diversity of opinion arose as to whether the *amendment* could be made both before and after judgment. "To put the thing in more open knowledge," Cap. IV, 9 Henry V (1421) authorized the justices before whom any plea, record, or process is depending to *amend* such plea, record, or process as well after judgment as before. As this statute was to remain in force until the convening of the Parliament "that shall be first holden after the return of our sovereign lord the King into England from beyond the sea," it was determined by the death of King Henry V in France. By Cap. III, 4 Henry VI (1425), however, this amelioration in the practice was made permanent and "effectual in law to endure for ever."

The principle of amendment was extended by Cap. XII,

8 Henry VI (1429), and applied to writs of error and other certifications. No judgment or record was to be reversed or annulled by error in the certification and the judges were empowered to cure any variance and "to reform and *amend* in affirmance of the judgments." A more comprehensive statute (Cap. XV) was enacted in the same year. This related not only to depending records and processes, but to returns of officers. The judges were given discretion, "to be taken where they shall think needful," to make *amendment* by reason of any default or misprision in the returns of sheriffs, coroners, bailiffs, and other officers, whether the default or misprision was due to the clerks of court or to the officers themselves or to their clerks.

Cap. XXX, 32 Henry VIII (1540), in supporting judgments after verdicts, where misjoinder, mispleading, jeofail or other defect appeared, gave force to the legal fiction that the defect had been cured by an *implied amendment*. This statute recited that litigants had been "greatly delayed and hindered in their suits and demands, by reason of crafty, subtile and negligent pleadings, * * * in ministering of their declarations and bars, as also in their replications, rejoinders, rebutters, joining of issues, and other pleadings," and then provided that after verdict rendered judgment should be entered "according to the said verdict, without any reversal or undoing of the same by writ of error, or of false judgment, in like form as though no such default or negligence had ever been had or committed." Cap. XIV, of 18 Elizabeth (1576) also related to judgments after verdict, that they should not be "stayed or reversed by reason of any default in form, or lack of form, touching false Latin or variance from the register, or other defaults in form, in any writ original or judicial, count, declaration, plaint, bill, suit or demand, or for want of any writ original or judicial, or

by reason of any imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or by reason of any manner of default in process." Cap. XIII, 21 James I (1623) extended the doctrine in like cases by making it applicable to numerous other forms of variance and defects.

Cap. VIII, of 16 and 17 Charles II (1664) was directed against the dilatory and vexatious practice of securing a stay of execution by writ of error and *supersedeas*, based on some immaterial variance or defect. This statute provided that the variances and defects therein enumerated "and all other matters of like nature, not being against the right of the matter of the suit, nor where by the issue or trial are altered, shall be *amended* by the justices or other judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error." Cap. XVI, 4 Anne (1705), was entitled "An act for the Amendment of the Law, and the better Advancement of Justice." This statute dealt broadly with the practice of the court, simplified the procedure, and restricted dilatory pleadings. "The court shall give judgment according to the very right of the cause," the first section concludes, "without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer." Cap. XX, 9 Anne (1710), was an act "for rendering the proceedings upon writs of *mandamus*, and informations in the nature of a *quo warranto*, more speedy and effectual; and for the more easily trying and determining the rights of offices and franchises in corporations and boroughs." This was more special in its nature, and intended to cure the mischief of delay. Another statute of amendment was Cap. XIII, 5 George I

(1718). This was styled: "An act for the Amendment of Writs of Error; and for the further preventing the arresting or reversing of Judgments after Verdict." It provided: "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be *amended and made agreeable to such record.*"

These Statutes of Amendment and Jeofail, and the numerous cases involving the interpretation and application of them, established the principle of *amendment* as a legal doctrine. This is evident from the early law dictionaries. Not many are at hand, but the following references will show that there was complete unanimity as to the scope and meaning of the word as a legal term applied to Court procedure.

"A Law-Dictionary. Interpreting such difficult and obscure Words and Terms, as are found either in Our Common or Statute, Ancient or Modern Lawes." By Thomas Blount, Esq., of the Inner Temple, London, 1670.

> "*Amendment signifies the correction of an Error committed in a Process*, and espied before or after Judgment; and sometimes after the party seeking advantage by the Error. Brook, *titulo*, Error and Amendment."

"The Practical Register: or, A General Abridgment of the LAW, As it is now practised in the several Courts, &c." Collected by the Author, John Lilly, Gent., London, 1725.

> "*Amendment is, where Error is in the Process*, there the Judges may amend it after Judgment. But if there be Error in giving of the Judgment (viz. a wrong Judgment is given) there they cannot amend it, but the Party must bring his Writ of Error; but where the Fault appears to be in the Clerk who writ the Record, it may be amended."

"A Law Dictionary: or the Interpreter of Words and

Terms, used either in the Common or Statute Laws of Great Britain, and in Tenures and Jocular Customs." Printed by Nutt & Gosling, London, 1727.

> "*Amendment, Emendatio, Signifies in Common Law, a Correction of an Error committed in a Process*, and espied before Judgment, and sometimes after the Party's seeking advantage by the Error. *Terms de la Ley. Bro. Tit.* Amendment *per tot.* But if the Fault be found after Judgment given, the Party that will redress it, is driven to his Writ of Error. *Bro. Tit.* Error and amendment."

"The Common Law Common-Plac'd: Containing The Substance and Effect of all the Common Law Cases, &c." By Giles Jacob, Gent., London, 1733.

> "*Amendment is the Correction of an Error committed in Writs and Process of Courts, and other Law Proceedings.* In many cases Faults of Clerks, shall be amended: But original Writs are not amenable at Common Law; though judicial Writs have been often amended. A Declaration grounded on original Writ, may not be amended, if the Writ be erroneous."

"A New Law-Dictionary: Containing The Interpretation and Definition of Words and Terms used in the LAW, &c." By Giles Jacob, Gent., London, 1744.

> "*Amendment, Emendatio, The Correction of an Error committed in any Process*, which may be amended after Judgment; but if there be any Error in giving the Judgment, the Party is driven to his Writ of Error: Though where the Fault appears to be in the Clerk who writ the Record, it may be amended. *Terms de Ley* 39."

The Commentaries of Judge Blackstone was published in 1753, and was widely read in the American colonies. In the Virginia convention Mr. Madison said: "I will refer

you to a book which is in every man's hand,—'Blackstone's Commentaries.'" Through the writings of Blackstone the history of the common law and the legal terms employed in English jurisprudence were fully understood by lawyer and layman. The work was frequently referred to and quoted, both in the Federal and State Conventions. In Blackstone's time the Statutes of Amendment and Jeofail were so well known and their principle so well established in the law that he refers to it as "the general doctrine of amendment," and narrates in full its origin and history. Sharswood's Ed., Bk. 3, Chap. 25, p. 207.

Pleadings at common law were framed for the purpose of bringing the parties to an exact issue and the amendment of a process assisted in perfecting the issue and carrying out the purpose of the process. In its common law application, therefore, the word *amend* still maintained its derivative meaning, as it was directed to (1) an existing quality of error in the process; (2) the removal of that existing quality of error; and (3) the substitution therefor of a better quality. The process remained the same process. It was perfected only to carry out its purpose. Amendment prevented the purpose of the process from being defeated. More important still, the principle was never applicable beyond the purpose or jurisdiction of the process. Every process was limited by the extent of the authority which issued it. The cases therefore will be searched in vain for any precedents where a Court by amendment extended its own jurisdiction, or where a Court, acting within its jurisdiction, permitted an amendment beyond the recognized purpose of the process amended. As Mr. Chief Justice Taney said in *Ableman* v. *Booth, supra*:

> "No judicial process, whatever form it may assume can have any lawful authority outside of the limits of

the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

It can not be urged that the able lawyers, who were members of the Federal and State Conventions, were the only ones conversant with the legal meaning of *amendment*, as the English dictionaries published during the thirty years prior to the drafting of the Constitution, in every instance so far as consulted, give a clear definition of the word at common law. These publications, although printed abroad, had a considerable circulation in America. As these dictionaries may not be easily available, we quote from them in full.

(a) A New Complete English Dictionary, by D. BELLAMY, 1760.

AME'ND, (v.) to correct, to improve by art; to reform what is amiss; to behave better than heretofore.

AME'NDMENT, (s.) denotes an alteration in a thing for the better, a reformation of life, recovery of health. *In Law, the correction of an error in the process.*

(b) Dictionary of the English Language, by SAMUEL JOHNSON, A. M., London, 1760.

AME'ND, v.a. (*amender*, Fr.) (1) To correct, to change anything that is wrong; (2) To reform to life,—Jeremiah. (3) To restore passages in writers which the copiers are supposed to have depraved.

AME'ND, v.n. To grow better,—Sydney.

AME'NDMENT, s. (*amendement*, Fr.) (1) A change from bad for the better,—Ray. (2) Reformation of life,—Hooker. (3) Recovery of health,—Shakespeare.

(4) *In law, the correction of an error committed in a process.*

(c) An Universal Etymological English Dictionary, by N. BAILEY, London, 1770.

AMEND', (*amender*, F.; of *amendare*, L.) To reform; to correct; to repair; to make or grow better.

AMEND'MENT, (*amendement*, F.) Reformation; correction.

AMENDMENT. *In law, the correction of an error committed and espied before judgment.*

(d) A New Dictionary of the English Language, by WILLIAM KENDRICK, LL.D., London, 1773.

AME'ND, A-MEND, v.a. (*amender*, Fr.; *emendo*, Lat.) to correct, to change anything that is wrong to something better; to reform to life or leave wickedness; to restore passages and writers which the copiers are supposed to have depraved; to recover the true meaning.

AME'ND, v.n. to grow better. To amend differs from to improve; to improve supposes or not denies that the thing is well already, but to amend implies something wrong.

AMENDMENT, A-MEND-MENT, n.s. (*amendement*, Fr.) A change from bad to better; reformation of life, recovery to health. *It signifies in law a correction of an error committed in a process and espied before or after judgment; and sometimes after the party's seeking advantage by the error.*

(e) A New and Complete Dictionary of the English Language, by JOHN ASH, LL.D., London, 1775.

AME'ND, (v.t. from the Lat. *amendo*, to mend) To correct; to restore.

AME'ND, (v. int.) To grow better.

AMEN'DMENT, (s. from amend) A change for the better; a reformation; a recovery; *in law, the correction of an error in a process.*

(f) The Royal English Dictionary, by D. FENNING, London, 1775.

AME'ND, v. (*amender*, Fr. *amendo*, Lat.) To alter something faulty for the better; applied to writings, to correct; to reform applied to manners or behavior. "Amend your ways and your doings." Jerem. xxvi, 13. To grow from a more infirm state to a better; to recover.

AME'NDMENT, s. (*amendement*, Fr.) An alteration which makes it better; a correction, a change from vice to virtue; it signifies a change from sickness towards health; a recovery.

AME'NDMENT, s. (*amendatio*, Lat.) *In law, a correction of an error committed in a process.*

(g) An Universal Etymological English Dictionary, by N. BAILEY, London, 1780.

AMEND', (*amender*, F.; of *amendare*, L.) To reform; to correct; to repair; to make or grow better.

AMEND'MENT, (*amendement*, F.) Reformation; correction.

AMENDMENT. *In law, the correction of an error committed in a process observed before judgment which also may be amended by the Justices after judgment.*

(h) A General Dictionary of the English Language, by THOMAS SHERIDAN, A.M., London, 1780.

AMEND, A-MEND', v.a. To correct, to change anything that is wrong, to reform the life, to restore passages, etc.

AMEND, A-MEND', v.n. To grow better.

AMENDMENT, A-MEND'MENT, s. To change from bad

for the better, reformation of life, recovery of health; *in law, the correction of an error committed in a process.*

(i) A Complete and Universal English Dictionary, by JAMES BARCLAY, 1782.

AME'ND, v.a. (*amender*, Fr.) To alter something faulty for the better, applied to writings to correct; to reform applied to manners or behaviour; to grow from a more infirm state to a better; to recover.

AME'NDMENT, s. (*amendement*, Fr.) An alteration which makes it better; a correction, a change from vice to virtue; it signifies a change from sickness towards health; to recover; *in law, the correction of an error committed in a process.*

(j) A Complete Dictionary of the English Language, by THOMAS SHERIDAN, 3d. ed., London, 1790, 2v. Same definitions as in the London edition of 1780. (*infra.*)

(k) A Complete Dictionary of the English Language, by THOMAS SHERIDAN, 4th ed., Dublin, 1790, 906 p. Same definitions as in the London edition of 1780. (*infra.*)

(l) A Critical Pronouncing Dictionary and Expositor of the English Language, by JOHN WALKER, London, 1791.

TO AMEND, v.a. To correct, to change any thing that is wrong; to reform the life; to restore passages in writers which the copiers are supposed to have depraved.

TO AMEND, v.n. To grow better.

AMENDMENT, s. A change from bad for the better; reformation of life; recovery of health; *in law, the correction of an error committed in a process.*

There was no English dictionary printed in America prior to the drafting of the Federal Constitution. The first

from an American press was "The Royal Standard English Dictionary: the First American Edition, carefully revised and corrected from the Fourth British Edition, by William Perry, Lecturer, in the Academy at Edinburgh." This was printed at Worcester, Mass., in 1788.

In erecting a super-government over existing State governments the framers of the Constitution initiated a novel political experiment. There was no precedent in all history to guide them in its construction. A new sovereignty was to be created over the same people and over the same territory where existing sovereignties already held sway. The super-government necessarily must be limited to keep it within its own field of operation to prevent conflict and discord. It must necessarily be limited both as to its purposes and as to its powers. The nearest analogies in law to such a delegation of limited authority were restricted grants and powers of attorney. And as the powers were to be granted or delegated by the sovereign people the instrument of the grant or delegation of authority was in its nature a great process under the teste of the people of the United States. The instrument was repeatedly referred to as a great warrant, or charter, or commission of authority. Mr. Iredell in the North Carolina Convention well expressed this view:

> "It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as *a great power of attorney*, under which no power can be exercised but what is expressly given. Did any man ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him?" El. Deb., Vol. 4, p. 148.

The Constitution thus being viewed as a great legal

process, warrant or commission, the principle of amendment which had been applied for centuries to judicial processes and legal documents became directly applicable. And as amendment was always limited to the jurisdiction of the process, or to the purpose of the pleading, or to the scope of the legal document, the term was especially appropriate in relation to a written Constitution designedly limited in all these respects.

(D) Mr. Madison's Interpretation.

As the selection of the word *amendment* in Article V was due to Mr. Madison, it is in point to ascertain the particular significance he gave to the word. In the Federal Convention on August 13th, upon motion of Mr. Randolph, the following proposition (Art. 1, Sec. 7) was before the House:

> "Bills for raising money for the purpose of revenue or for appropriating the same shall originate in the House of Representatives and shall not be so *amended or altered* by the Senate as to increase or diminish the sum to be raised or change the mode of levying it or the object of its appropriation." *Farrand*, Vol. 2, p. 273.

In speaking to this proposition Mr. Madison thus criticised its phraseology:

> "The words 'amend or alter,' form an equal source of doubt and altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Representatives it will be called *an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the degree of connection between the matter and object of the bill and the amendment offered to it.* Can there be a more fruitful

source of dispute, or a kind of dispute more difficult to be settled?" *Farrand*, Vol. 2, p. 276.

It is clear from this statement that Mr. Madison's conception was that an amendment did not include an origination, and did not embrace extraneous matter, but necessitated some connection or relation between an amendment and the thing amended. Mr. Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 477 (1849), said: "The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense."

The same section of the Constitution was under consideration in the case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, 142 (1911). It was there contended that an act was unconstitutional because it was a revenue measure and originated in the Senate in violation of Section 7, of Article I, of the Constitution, providing that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with *amendments* as on other bills." Mr. Justice Day, speaking for the Court, said:

> "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. *The amendment was germane to the subject matter of the bill*, and not beyond the power of the Senate to propose."

(E) Contemporaneous Interpretation.

Great weight has always been attached to contemporaneous exposition. The provision in Article V of the Constitution for the amendment of the instrument did not provoke much discussion in the several State Conventions which ratified the Constitution. The authors of *The Federalist* devoted very little attention to the subject. There seems to have been a general acquiescence in the propriety of the provision.

In 1787 parliamentary procedure was more exact and logical than it is today. An amendment was then a matter of substance, entirely a matter of substance. The mere form of introducing a proposition which was new or which was unrelated and extraneous to the matter under discussion was never called an amendment. If new matter was desired to be introduced, the procedure was to move to postpone the consideration of the proposition then before the House and after that was adopted to bring forward the new proposition. Numerous instances of this procedure may be found in the Records of the Federal Convention. A rule adopted by the First Congress at its first session clearly states the accepted parliamentary practice of that period. The one referred to provides that

> "No new motion or proposition shall be admitted, under color of amendment, as a substitute for the motion or proposition under debate." Gales & Seaton's Debates, Vol. 1, p. 104.

The following extracts from the debates in the State Conventions illustrate the use of the word *amendment* at that time. They also prove that it was the general understanding that an *amendment* was the correction of errors committed in drafting the Constitution; that such errors were expected to develop in the operation of the government

and that from experience alone they could be determined and best corrected. Elliot's Debates.

Mr. Iredell, (N. C.): "The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no *error in what they did.* The gentlemen who framed this Constitution thought with much more diffidence of their capacities; and, undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. * * * It is a most happy circumstance, that there is a remedy in the system itself for *its own fallibility*, so that alterations can without difficulty be made, agreeable to the general sense of the public." Vol. 4, p. 176.

Gov. Bowdoin, (Mass.): "Like all other human productions, *it may be imperfect;* but most of the imperfections imputed to it are ideal and unfounded, and the rest are of such a nature that they cannot be certainly known but by the operation of the Constitution; and if, *in its operation*, it should in any respect be essentially bad, it will be amended in one of the modes prescribed by it." Vol. 2, pp. 83, 84.

Mr. Ames, (Mass.): "This Constitution may be good without any amendments, and yet the amendments may be good; for they are not *repugnant* to the Constitution." Vol. 2, p. 155.

Mr. Thatcher, (Mass.): "After all, I by no means pretend that there is complete perfection in this proposed Constitution. Like all other human productions, *it hath its faults.* Provision is made for an amendment, whenever, *from practice*, it is found oppressive." Vol. 2, p. 146.

Mr. Lee, (Va.): "To fortify this security, is there not a constitutional remedy in the government, to reform *any errors* which shall be found inconvenient?" Vol. 3, p. 186.

Mr. Taylor, (N. C.): "Mr. Joseph Taylor thought it improper to object to every trivial case; that this clause had been argued on in some degree before; and that it would be a useless waste of time to dwell any longer on it; that if they had the power of amending the Constitution, every part need not be discussed, as some were not objectionable; and that, for his own part, he would object when any *essential* defect came before the house." Vol. 4, p. 104.

Mr. Jarvis, (Mass.): "Mr. President, I cannot suffer the present article to be passed, without rising to express my entire and perfect approbation of it. Whatever may have been my private opinion of any other part, or whatever *faults or imperfections* I have remarked, or fancied I have seen, in any other instance, here, sir, I have found complete satisfaction; this has been a resting place, on which I have reposed myself in the fullest security, whenever a doubt has occurred, in considering any other passage in the proposed Constitution." Vol. 2, p. 116.

Mr. Iredell, (N. C.): "Should the *government on trial* be found to want amendments, those amendments can be made in a regular method, in a mode prescribed by the Constitution itself." Vol. 4, p. 130.

Mr. Wilson, (Pa.): "This Constitution may be found to have *defects in it;* hence amendments may become necessary." Vol. 2, p. 498.

Mr. King, (Mass.): "He believed gentlemen had not, in their objections to the Constitution, recollected

that this article was a part of it; for many of the arguments of gentlemen were founded on the idea of future amendments being impracticable. The honorable gentleman observed on the superior excellence of the proposed Constitution in this particular, and called upon gentlemen to produce an instance, in any other national constitution, where the people had so fair an opportunity *to correct any abuse which might take place in the future administration of the government under it.*" Vol. 2, p. 116.

In several of the State conventions the point was raised that the Philadelphia Convention had exceeded its authority in proposing the new Constitution; that the members of that Convention were commissioned by the States to *amend* the Articles of Confederation; and that instead of *amending* those Articles they had drafted an instrument *entirely new and different.* It was generally recognized that the framers of the Constitution did exceed their authority, for their credentials did not empower them to destroy the existing government under the Articles of Confederation and create an entirely new and different Constitution. In Virginia Mr. Thompson said: "The Convention were sent on to Philadelphia to *amend* this Confederation; but they made a *new* creature." Vol. 3, p. 61. And Mr. Grayson, making the same distinction, remarked: "The late Convention were not empowered totally *to alter* the present Confederation. The idea was *to amend.* If they lay before us a thing quite different, we are not bound to accept it." Vol. 3, p. 614.

(F) Interpretation from Context.

By giving to the word *amendment* its common law meaning, Article V expresses a plain, simple, unequivocal intent to provide for the correction of errors committed in framing the Constitution. Such a provision would be a natural precaution against unintentional errors and against defects that might develop in the course of its operation. If this were in reality the purpose, it could not have been more accurately and exactly expressed. This purpose comports with a consistent and harmonious construction of the instrument as a whole. On the other hand, if some vague and corrupt meaning be given to *amendment*, or if the word in Article V is eliminated as it practically is by defendants' doctrine, then the most serious inconsistencies and consequences ensue. The object of all interpretation and construction is to determine the intent of the framers of the Constitution. Where the legal significance of a word may be gathered from its usage and application at the common law and where that meaning in connection with the context expresses a plain and simple intent, there must be some strong reason advanced for not accepting an interpretation so apparent on the face of the instrument. In this connection Judge Cooley quotes the following with approval:

> "Whether we are considering an agreement between parties, a statute, or a constitution with a view to its interpretation, the thing which we are to seek is *the thought which it expresses.* To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. *If thus regarded, the words embody a definite meaning, which involve no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is*

the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning." Cons. Lim., 7th Ed., p. 91.

(a) "THIS CONSTITUTION."

While the interpretation of the word may leave no room for construction, still construction may be resorted to for the purpose of confirming the result of interpretation alone. By Article V Congress is only authorized to propose "amendments to *this* Constitution." What is *this* Constitution? It is not a code; it is not a body of transient laws. The framers of the instrument fully understood that they were establishing political principles that were fundamental and upon which the governmental structure was to be erected. Mr. Hamilton said in the New York Convention: "Constitutions should consist only of general provisions: the reason is, that they must necessarily be permanent, and that they cannot calculate for the possible change of things." El Deb., Vol. 2, p. 364. In North Carolina Mr. Johnson inquired: "Are laws as immutable as Constitutions? Can anything be more absurd than assimilating the one to the other? The idea is not warranted by the Constitution, nor consistent with reason." El. Deb., Vol. 4, p. 188. In the same State Mr. Iredell remarked: "Gentlemen will be pleased to consider that there is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing which ought not to

be done often. When regulated by law, it can easily be occasionally altered so as best to suit the conveniences of the people." El. Deb., Vol. 4, p. 144. That the Constitution deals only with the structure of government, the delegation of powers and the distribution of them, was stated by Mr. Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch, 137 (1803):

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.
>
> "This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
>
> "The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

In *Van Horn* v. *Dorrance,* 2 Dall. 304, 308 (1795), Mr. Justice Patterson expressed the same view:

> "What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land."

A Constitution is variously defined by text writers, but they all agreed as to its fundamental nature. The follow-

ing distinction between fundamental principles and ordinary laws may be quoted from Jameson's Constitutional Conventions, 4th Ed., Sec. 85:

> "Before proceeding to the task indicated, however, it may be useful to ascertain with precision the distinction between a *constitution* or *fundamental ordinance*, and an *ordinary municipal law*. Both must be denominated laws, since they are equally 'rules of action laid down or prescribed by a superior.' *Ordinary laws are enactments and rules for the government of civil conduct*, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. *Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation*, and the apparatus of checks and balances proper to insure its integrity and continued existence. *Fundamental laws are primary*, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. *Ordinary laws are secondary*, having reference to the exigencies of time and place resulting from the ordinary working of the machine. *Fundamental laws precede ordinary laws in point of time*, and embrace the settled policy of the state. Ordinary laws, are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and express, as we have said, the expedient, or the right viewed as the expedient, under the varying circumstances of time and place."

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 227 (1916), Mr. Justice Pitney observed:

> "At this late day it ought not to be necessary to repeat that the object of the framers of that instrument

was to lay the foundation of a government, to set up its framework and to establish merely the general principles by which it was to be animated."

This Constitution therefore is a framework of government and the embodiment of the fundamental principles upon which it is established. It is to this Constitution that Congress is authorized to make proposals of amendment. The proposals may not be other than amendments, and the character of them should be harmonious with the Constitution itself. By an amendment the identity or purpose of the instrument is not designed to be changed, but only a defective quality in it that has become apparent by the operation of government under it. The Constitution must still be *this* Constitution after it is amended. The words "this Constitution" were substituted for "Articles of Union" in the Federal Convention. This substitution did not change the intent. This Constitution is still the Articles of Union and it is *this* Constitution in its several articles that is amendable. Furthermore, it is a limited Constitution and must remain a limited Constitution after amendment. It would be the greatest absurdity to contend that there was a purpose to create a limited government and at the same time to confer upon that government a power to do away with its own limitations. It is only under *this* Constitution that the amending function may be exercised, and when the limitations of this Constitution are overridden, even the authority to amend ceases, for *this* Constitution would then no longer exist.

In *Marbury* v. *Madison, supra,* Mr. Chief Justice Marshall emphasizes the importance and the permanency of constitutional limitations.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these

limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. * * *

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

(b) "Deem it Necessary."

Article V provides that "Congress, whenever two-thirds of both Houses shall deem it *necessary*, shall propose Amendments to this Constitution." Reference has already been made to the Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780. The corresponding phrase in the former reads, "as there appear an absolute necessity of amending any article of the Constitution," and in the latter, "such alterations as from experience shall be found necessary." The word "necessary" in Article V was evidently taken from these prior examples of its use in the amendatory provisions of the Pennsylvania and Massachusetts Constitutions. The word must be given some significance in Article V. The doctrine of the defendants, however, gives no more effect to it than to the word *amendment*.

The defendants claim that Congress at any time has the power to propose any proposition as an Amendment, and that the enactment of the proposal constitutes a determination of the necessity of it. Thus a wide door is opened to speculation upon new theories of government, and the amending function is converted into a means of trying out such theories in the form of constitutional experimentations.

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, *supra*, discussed at length the meaning of the word "necessary" in Art. 1, Sec. 8, Par. 19. He remarked with reference to it: "This word then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." He concluded the argument on this point with the statement of that rule so frequently cited: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." While it is not the purpose of this brief to urge any test of constitutionality in this cause, no better one suggests itself as to the measure of a valid amendment. Let the end be legitimate, let it be within the scope of the Constitution, and all proposals of Amendment which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are valid.

The word "necessary" in Article V implies that an amendment is not a matter of speculation. In the First Congress it was suggested that a vote upon the necessity of an amendment should precede the vote upon the proposal itself. The suggestion was not followed, but, nevertheless, it reflected the importance attached to the word at that time.

Many of the members of the First Congress had participated either in the Federal or State Conventions. Their debates upon the submission of the first ten Amendments clearly show that they understood an amendment to be the correction of a defect in the Constitution which should disclose itself in the operation of the government, and that the necessity for amendment could only be determined by experience. The following remarks are taken from these debates. Gales & Seaton's Debates, Vol. 1:

> MR. WHITE: "I think a majority of the people who have ratified the constitution, did it under the expectation that Congress would, at some convenient time, examine its texture and point out where *it was defective*, in order that it might be judiciously amended. Whether, while we are without *experience*, amendments can be digested in such a manner as to give satisfaction to a constitutional majority of this House, I will not pretend to say." p. 445.

> MR. SHERMAN: "For my part, *I question if any alteration which can be now proposed would be an amendment, in the true sense of the word;* but nevertheless, I am willing to let the subject be introduced. * * * The provision for amendments made in the fifth article of the constitution, was intended to facilitate the adoption of those which *experience should point out to be necessary.*" pp. 445, 686.

> MR. JACKSON: "When the propriety of making amendments shall be obvious from *experience*, I trust there will be virtue enough in my country to make them. * * * Let the constitution have a fair trial; let it be examined by *experience*, discover by that test *what its errors are*, and then talk of amending; but to attempt it now is doing it at a risk, which is certainly imprudent. * * *

"Why will gentlemen press us to propose amendments, while we are without *experience?* * * * The *imperfections* of the Government are now unknown; let it have a fair trial, and I will be bound they show themselves; then we can tell where to apply the remedy, so as to secure the great object we are aiming at." pp. 442, 443, 461.

MR. AMES: "Mr. Ames begged to know the reasons upon which amendments were founded. He hoped it was not purely to gratify an indigested opinion; but in every part where they *retouch the edifice* it was with an intention of improving the structure; they certainly could not think of making alterations for the worse." p. 751.

MR. VINING: "Though the State I represent had the honor of taking the lead in the adoption of this constitution, and did it by a unanimous vote; and although I have the strongest predilection for the present form of Government, yet I am open to information, and willing to be convinced of *its imperfections.* If this be done, I shall cheerfully assist in correcting them. But I cannot think this a proper time to enter upon the subject; * * * for want of *experience,* we are as likely to do injury by our prescriptions as good." p. 448.

MR. JACKSON: "I am of opinion we ought not to be in a hurry with respect to altering the constitution. For my part, *I have no idea of speculating in this serious manner on theory. If I agree to alterations in the mode of administering this Government, I shall like to stand on the sure ground of experience, and not be treading air. What experience have we had of the good or bad qualities of this constitution? Can any gentleman affirm to me one proposition that is a certain and absolute amendment? I deny that he can.* Our constitution, sir, is like a vessel just launched, and lying at the wharf;

she is untried, you can hardly discover any one of her properties. It is not known how she will answer her helm, or lay her course; whether she will bear with safety the precious freight to be deposited in her hold. But, in this state, will the prudent merchant attempt alterations? Will he employ workmen to tear off the planking and take asunder the frame? He certainly will not. Let us, gentlemen, fit out our vessel, set up her masts, and expand her sails, and be guided by the experiment in our alterations. If she sails upon an uneven keel, let us right her by adding weight where it is wanting. In this way, we may remedy her *defects* to the satisfaction of all concerned; but if we proceed now to make alterations, we may deface a beauty, or deform a well proportioned piece of workmanship." pp. 441, 442.

In the present cause, the defects which the so-called Eighteenth Amendment are designed to cure are not defects in the operation of the Federal Government, for the Federal Government is entirely without power over the subject matter of the so-called Amendment and has never operated in respect to the subject matter. Neither has Congress had any experience whatever, either in exercising the power of police or in dealing with the subject matter within the territorial limits of the States. Congress, therefore, cannot constitutionally "deem it necessary" to propose an amendment to this Constitution so utterly unrelated to the operation of the Federal Government thereunder. Necessity for amendment can only arise in consequence of defects in the operation of government under the Constitution. There can be no necessity beyond the scope of the Constitution.

(9) Prior Amendments.

An examination of the prior amendments to the Constitution will disclose that all of them have been declaratory and interpretative or have had reference to a power or to a subject matter dealt with in the instrument itself. They have all been within the scope of the Constitution. The first eleven declared the meaning of the original document as it was understood by those who framed and ratified it; the twelfth related to a specific article dealing with the election of the Executive; the thirteenth, fourteenth and fifteenth broadly concerned a great constitutional compromise which appears in several articles; they constituted a new Magna Charta and recorded the inexorable decree of civil war; the sixteenth modified the application of the taxing power, and the seventeenth changed the method of electing Senators. They were all proposed and ratified as corrections of errors that developed in the course of the actual operation of the Federal Government.

(A) First Ten Amendments.

The first ten amendments were proposed by the First Congress, on September 25, 1789. They had their origin in the purpose to fix definite limitations upon the general government. This purpose was to prevent encroachments upon the powers of the States. In the discussion upon the adoption of the Constitution, the Federalists had claimed that the general government was definitely limited by the terms of the Constitution and that all powers not expressly delegated therein were reserved to the respective States. The Anti-Federalists were in doubt and contended that if these limita-

tions were intended the Constitution should plainly state that intent. In so far, therefore, as the Constitution failed to set forth the exact limitations which were intended by all parties, these Amendments may be said to be a correction of an error in the process. The Constitution was not changed in any respect by their adoption. They neither increased nor diminished any power. They have always been construed as limitations upon the powers of the Federal Government, but they imposed no further limitations than those intended by a correct construction of the original document. These Amendments are regarded as a contemporaneous exposition of the original instrument and a part of it.

Barron v. *Baltimore*, 7 Pet. 243 (1833).

Spies v. *Illinois*, 123 U. S. 131 (1887).

Davis v. *Texas*, 139 U. S. 651 (1890).

O'Neil v. *Vermont*, 144 U. S. 323 (1891).

Miller v. *Texas*, 153 U. S. 535 (1893).

Brown v. *New Jersey*, 175 U. S. 172 (1899).

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238 (1901).

(B) Eleventh Amendment.

The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This Amendment was due to a construction of the Constitution other than had been intended by its framers. Art. 3, Sec. 2, provides that the judicial power shall extend to controversies "between a State and citizens of another State." In the case of *Chis-*

holm v. *Georgia*, 2 Dall. 419 (1793), that clause was construed to include suits by a citizen of one State against another State. It was the general understanding at the time of the adoption of the Constitution, however, that that clause was restricted to suits by a State against citizens of another State. In so far, therefore, as the Constitution failed to express accurately the intent and purpose of those who framed and adopted it, this Amendment likewise was the correction of an error in the process.

Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), said in reference to this Amendment:

> "It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures."

Mr. Justice Campbell in *Florida v. Georgia*, 17 How. 478 (1854), fully explains the corrective purpose of this Amendment:

> "While the constitution was under discussion, General Hamilton (Federalist, 81) said, 'that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent,' and contended 'that to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the state governments, a power which would involve such consequences, would be altogether forced and unwarrantable.' So, Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Vir-

ginia convention by assuring it that 'it is not in the power of individuals to call any State into court. The only operation the clause can have is, that if a State should wish to bring a suit against a citizen, it must be brought in a federal court.' And the late Chief Justice Marshall supported him, saying: 'With respect to disputes between a State and citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a federal court. It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words.' Virginia Deb., 387, 405, 406.

"When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the States, by individual plaintiffs, shortly after the adoption of the constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the States as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation."

(C) Twelfth Amendment.

The original Constitution, in Art. 2, Sec. 3, directed in detail the manner in which the President of the United States should be elected. The historic contest between Mr. Jefferson and Mr. Burr for that office in 1800-1801, disclosed a defect in the operation of the electoral system. This defect was remedied by the Twelfth Amendment. This Amendment, therefore, like those that preceded

it, was the correction of an error committed in the process. Through actual experience in the operation of the government one of the structural provisions of the Constitution had been proven defective. There was no diminution or enlargement of powers to Nation or State. The Amendment was purely corrective.

(D) Thirteenth Amendment.

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the parties shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction." The Civil War terminated slavery and all incidents of slavery. It gave to the colored man the status of a freeman and placed him upon an equality with others under the law. Force alone brought about these results. The Civil War amendments simply recorded these results and secured to the colored man those rights that are inseparable from the status of freemen,—the rights of equality under the law. Equality under the law is a principle of republicanism. These three Amendments must be considered together and interpreted from an historical point of view. In speaking of them, Mr. Justice Miller in the *Slaughter-House Cases*, 83 U. S. 36 (1872), said:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and

the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." • • • "Fairly construed, these Amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject except in the Territories."

Slavery had been dealt with in the orginal Constitution. Art. 1, Sec. 2, Par. 3; Art. 1, Sec. 9, Par. 1; Art. 4, Sec. 2; Art. 5. In 1772 it had been declared contrary to the laws of England by Lord Mansfield, in *Somerset* v. *Stewart*, 20 State Trials, 1, 82; and in 1781 it had been declared contrary to the Massachusetts Declaration of Rights by a Massachusetts Court. It was one of the compromises of the Constitution and so understood in the Federal and State Conventions. In the Massachusetts Convention, Mr. Thompson inquired: "Mr. President, shall it be said that after we have established our own independence and freedom, we make slaves of others?" El. Deb., Vol. 2, p. 107. In the same Convention Mr. Heath said:

"If we ratify the Constitution, shall we do anything by our act to hold the blacks in slavery? or shall we become the partakers of other men's sins? I think, neither of them. Each state is sovereign and independent to a certain degree, and the states have a right, and they will regulate their own internal affairs as to them-

selves appears proper; and shall we refuse to eat, or to drink, or to be united, with those who do not think, or act, just as we do? Surely not. We are not, in this case, partakers of other men's sins; for in nothing do we voluntarily encourage the slavery of our fellowmen. A restriction is laid on the federal government, which could not be avoided, and a union take place. The federal Convention went as far as they could." El. Deb., Vol. 2, p. 115.

Mr. Iredell, in North Carolina, remarked in reference to the same subject:

> "For my part, were it practicable to put an end to the importation of slaves immediately, it would give me the greatest pleasure; for it certainly is a trade utterly inconsistent with the rights of humanity, and under which great cruelties have been exercised. When the entire abolition of slavery takes place, it will be an event which must be pleasing to every generous mind, and every friend of human nature; but we often wish for things which are not attainable." El. Deb., Vol. 4, p. 100.

The subject of slavery was compromised not only at the time of the framing of the Constitution, but continued to be compromised in Congress for half a century. It occasioned continuous political strife, threatened the existence of the Union, and furnished the underlying cause of the Civil War. At the conclusion of that War the complete elimination of the cause of so much evil was necessary to the existence of the Nation. As the Constitution breathes the spirit of the freedom and equality of the Declaration of Independence, the fact that the subject of slavery was compromised in the Federal Convention of 1787 must now be regarded as an error. It was so recognized, even at the time, but circumstances made that error unavoidable. That error committed in the process was cured by force of arms.

Thereafter the result of military force was recorded through these Amendments. These Amendments would probably never have been adopted by the Legislatures of three-fourths of the several States had not the political power of Congress, backed up by the full military strength of the Nation, compelled their ratification. It is a matter of history that the Federal Government declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection until they ratified those articles by a formal vote of their legislative bodies. It was therefore force, and force alone, that placed these Amendments in the Federal Constitution, and the law of self-preservation was the justification of the course pursued.

(E) Fourteenth Amendment.

(1) "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." With reference to this clause of the Fourteenth Amendment, Mr. Justice Miller in the *Slaughter-House Cases, supra,* said:

> "The 1st section of the 14th article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union.

Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country had never been overruled; and, if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

"To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a State, the 1st clause of the 1st section was framed."

(2) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Mr. Justice Washington, in *Corfield* v. *Coryell*, 4 Wash. C. C. 380, defined the privileges and immunities of citizens of the United States.

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general

heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the citizens of the other State,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities; and the enjoyment of them by the citizens of each State in every other State was manifestly calculated 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.'"

In the *Slaughter-House Cases, supra,* Mr. Justice Swayne said in reference to this clause:

"A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. 'The privileges and immunities' of a citizen of the United States include, among other things, the fundamental rights of life, liberty and property, and also the rights which pertain to him by reason of his

membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection."

(3) "Nor shall any State deprive any person of life, liberty or property, without due process of law." Explaining this clause in the *Slaughter-House Cases*, *supra*, Mr. Justice Swayne said:

> "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. 'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure. The 'equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness. *Corfield* v. *Coryell*, 4 Wash. C. C., 380; *Lemmon* v. *People*, 26 Barb., 274, and 20 N. Y., 626; *Conner* v. *Elliott*, 18 How., 593; *Murray* v. *McCarty*, 2 Munf. 399; *Campbell* v. *Morris*, 3 Har. & McH. 554; *Towles'* case,

5 Leigh, 748; *State* v. *Medbury*, 3 R. I., 142; 1 Tucker, Bl., 145; 1 Cooley, Bl., 125, 128." * * *

In *United States* v. *Cruikshank*, 92 U. S. 542 (1875), Mr. Justice Waite said on the same subject:

> "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank* v. *Okely*, 4 Wheat. 244, it secures 'The individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

(4) "Nor deny to any person within its jurisdiction the equal protection of the laws." With reference to this clause, Mr. Justice Waite in *United States* v. *Cruikshank*, *supra*, remarked:

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

(F) Fifteenth Amendment.

"The right of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." Mr. Justice Washington in *Corfield* v. *Coryell, supra,* held that the elective franchise, as regulated and established by the laws or constitution of a State in which it is to be exercised, was one of the privileges of citizens of all free governments. The Federal Constitution, however, does not confer the right of suffrage; it accepts the electors as qualified in the several States as its own electors. The Fifteenth Amendment does not confer any right of suffrage, but simply imposes an inhibition that was consistent with free government and personal equality under the law,—an inhibition against unjust and unreasonable discrimination in the matter of suffrage.

In *United States* v. *Cruikshank, supra,* Mr. Justice Waite clearly explained the scope of this Amendment:

> "In *Minor* v. *Happersett,* 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *U. S.* v. *Reese,* just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United

States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The Civil War abolished slavery and all the incidents of slavery. It did not change the fundamental relation between State and Nation. The balance between State and Federal powers was not disturbed by the Thirteenth, Fourteenth and Fifteenth Amendments. The sovereign powers of a State were still reserved and possessed as original and inherent. And the sovereign powers of the Nation were still subject to constitutional limitations.

Mr. Justice Field, in *Bartemeyer* v. *Iowa*, 18 Wall. 129, 138 (1874):

> "No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that Amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose."

Mr. Justice Field, in *Barbier* v. *Connolly*, 113 U. S. 27, 31 (1885):

> "But neither the Amendment,—broad and comprehensive as it is,—nor any other Amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Mr. Chief Justice Fuller, in *In re Rahrer,* 140 U. S. 545, 554 (1891):

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *

"The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

Mr. Justice Miller, in the *Slaughter-House Cases,* 83 U. S. 36 (1872):

"But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that *this court, so far as its function required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.*"

(G) Sixteenth Amendment.

By Art. 1, Sec. 8, Congress has power to lay and collect taxes. In Art. 1, Sec. 9, however, it was provided that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." The Sixteenth Amendment related to a power delegated to Congress by the Constitution. It neither increased nor diminished that power. It simply provided for a more just and equitable exercise of that power. In so far as this Amendment was designed to permit a better method in the exercise of a delegated power, it may be said to be the correction of an error committed in the process. The Amendment was not an infringement upon the powers of the States.

(H) Seventeenth Amendment.

This Amendment relating to the election of United States senators by the people, was in lieu of Par. 1, of Sec. 3, of Art. 1, and in lieu of so much of Par. 2 of the same section as related to the filling of vacancies. It has direct references to articles and sections in the Constitution. It strictly concerns no substantive power of either Nation or State. Its theory is to substitute a better method in the election of United States senators. So far as this change was regarded as an improvement in the selection of senators to represent a State, it may be said that the Amendment was the correction of an error committed in the process.

(10) The Amending Function is Purely Federal.

The Constitution was established by the people of the United States for their own government, and not for the government of the individual States. The powers the people of the United States conferred on this government were to be exercised by the government itself. All the instrumentalities for exercising powers conferred are federal. The power to amend the Constitution is a federal function. It relates to the Constitution which was established by the people of the United States for their own government. The power to amend the Constitution was provided by the people of the United States as a means of correcting errors committed in the establishment of their own government.

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), said:

> "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

That the execution of any power or the carrying out of any function under one sovereign government should be dependent in any way upon the will or discretion of another sovereign government, or that one sovereign government under the guise of an amendatory provision can invade and intermeddle with the powers and jurisdiction of another

sovereign government is so inconsistent with all conceptions of sovereignty and the attributes of sovereignty that the mere statement of either proposition should be a sufficient refutation of it. In *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), Mr. Chief Justice Marshall observed:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself."

Congress in proposing, and the Legislatures in ratifying an amendment to the Constitution, are federal representatives. They derive all their power and authority from the Constitution. They derive no power from the laws or constitutions of the several States. Congress and the Legislatures of the several States were made an amending branch of the Federal Government for the purposes expressed in Article V, and like other branches of the Federal Government, must find their powers within the Constitution. They act as the representatives of the people of the United States. They cannot exceed the powers of their principal, the people of the United States. The Constitution is the measure of these powers, as no portion of sovereignty resides in government.

The State is not a party to the amendment of the United States Constitution. The sovereign people of a State do

not participate. The State, as a body politic, takes no part. "A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." *Texas* v. *White*, *supra*. The Legislature of a State, in ratifying an amendment, does not act for the State, and cannot relinquish the sovereign powers of the State. The Legislature is a creature and not the creator of a State constitution. The members of a State Legislature have official powers, but they do not participate in sovereignty in any other capacity than as citizens, like other citizens of the State. A State is bound in respect to its sovereign powers only by an explicit act of the whole people. If the sovereign powers of a State reside in the people of the State, so the discretion in the exercise of those powers resides in the people. Congress may not constitutionally propose, therefore, nor may the Legislature of a State constitutionally ratify any proposition as an amendment that involves the exercise or the relinquishment of the sovereign powers of a State. The people of a State alone are competent to an expression of sovereign will.

In case of a valid amendment the consent of the people of the United States is implied from the original delegation of powers in the Federal Constitution and as an incident to them. A valid amendment requires no expression of the sovereign will of the people of the United States. To be valid, an amendment must have such relation to the original grant of powers and to the scope and purposes of the Constitution as will carry an implication of assent on the part of the people of the United States. The proposal of the so-called Amendment in the present case has no relation to any of the expressed or implied powers in the Constitution, and

its subject matter is entirely without the jurisdiction and powers of the people of the United States. The implication of assent on the part of the people of the United States cannot arise when the power involved and the subject matter dealt with are entirely beyond their sphere of action.

In discussing the provisions of Article V of the Constitution, the Supreme Court of Maine, in delivering an advisory opinion on the question of a referendum upon the so-called Amendment, said:

> "All the federal amendments which have thus far been adopted have been proposed in compliance with the first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth* v. *Virginia*, 3 Dall. 378; *State* v. *Dahl*, 6 N. D. 81. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the *people of the United States* under the power expressly conferred by Article V, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.
>
> "As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

"First, by the Legislatures of three-fourths of the several States; or,

"Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

"Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

"Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people (of the United States)* as a ratifying body, under the power expressly conferred upon it by Article V. The people (of the United States)* through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They (the people of the United States)* retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly. * * *

"It admits of no doubt that the matter of amendment which is governed by Article V, the people (of the United States)* divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislatures or upon state constitutional conventions." *In re Opinion of Justices*, 107 Atl. Rep. 673 (1919).

* Parentheses ours.

In *Dodge* v. *Woolsey*, 19 How. 348 (1856), Mr. Justice Wayne, in emphasizing the supremacy of the Constitution, said:

> "It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they (the people of the United States)* have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them (the people of the United States)* by the Congress of the United States, when two-thirds of both houses shall propose them, or when the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of them, as proposed by Congress. * * * Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people (of the United States)* upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it."

A well known writer on Constitutional Law, after tracing the history and the scope of Article V, concludes as follows:

> "Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people (of the United States)* either in Legislature or in convention, and not by the people (of the United States)* voting on it directly. The people (of the United States)* have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." Watson, Const., Vol. 2, p. 1310.

* Parentheses ours.

(11) The Proposal of the So-called Eighteenth Amendment Was Unconstitutional.

The practice of Congress in proposing Amendments has been uniform since the Constitution was adopted and clearly indicates that Congress in proposing and the Legislatures in ratifying an Amendment are federal representatives designated for the performance of a federal function. Heretofore, in every instance Congress has proposed Amendments *to the Legislatures* of the several States. In the case of the so-called Eighteenth Amendment Congress has for the first time in one hundred and thirty years submitted the proposal of Amendment *to the States.*

The different course which was pursued in this instance was adopted understandingly and with a purpose. It was necessary to depart from the practice which had always heretofore obtained, in order to carry out the new constitutional doctrine, that the word "amendment" in Article V includes proposals covering the whole field of absolute sovereignty. In the proposal of the so-called Amendment, neither a power nor a subject matter within the scope of the Federal Constitution was dealt with. On the contrary, the power involved resided in the sovereign people of the respective States, and in them exclusively. It was necessary, therefore, in order to obtain a surrender of such power to propose the so-called Amendment to those who possessed it. Recognizing this necessity, Congress made the proposal of the so-called Amendment *to the respective States, that is, to the sovereign people of the respective States. Such a submission of the proposal to the States is nowhere recognized by the Federal Constitution and is a revolutionary proceeding.* The course which has hitherto been pursued in reference to the submission of Amendments to the Legislatures

of the several States is clearly indicated by the joint resolutions adopted by Congress submitting prior Amendments.

(a) Twelve Amendments were submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 25th of September, 1789, at the first session of the First Congress. Ten of these were ratified by the Legislatures, and became the first ten Amendments to the Constitution. The joint resolution of Congress was in the following form:

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following Articles be *proposed to the Legislatures* of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz:" (First Ten Amendments.) Doc. His. of Const., Vol. 2, p. 321.

(b) The Eleventh Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 5th of March, 1794, at the first session of the Third Congress, in the form following:

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following Article be *proposed to the Legislatures* of the several States, as an Amendment to the Constitution of the United States; which when ratified by three-fourths of the said Legislatures shall be valid as part of the said Constitution, viz:" (Eleventh Amendment.) Doc. His. of Const., Vol. 2, p. 391.

(c) The Twelfth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of

Congress, passed on the 12th of December, 1803, at the first session of the Eighth Congress. That the proposal was to the Legislatures is inferred and not expressed.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that in lieu of the third paragraph of the first section of the second article of the Constitution of the United States, the following be proposed as an Amendment to the Constitution of the United States, which when ratified by three-fourths of the Legislatures of the several States, shall be valid to all intents and purposes, as part of the said Constitution, to wit:" (Twelfth Amendment.) Doc. His. of Const., Vol. 2, p. 408.

(d) An amendment relating to Titles of Nobility was submitted *to the Legislatures* of the several States by a joint resolution of Congress, at the second session of the Eleventh Congress, begun and held at Washington on the 27th of November, 1809. This proposed amendment was not ratified. The form of its submission, however, is material.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following section be *submitted to the Legislatures* of the several States, which when ratified by the Legislatures of three-fourths of the States, shall be valid and binding, as a part of the Constitution of the United States, viz:" (Titles of Nobility.) Doc. His. of Const., Vol. 2, p. 452.

(e) An amendment forbidding Congress to interfere with the domestic institutions of the States was submitted *to the Legislatures* of the several States by a joint resolution of Congress at the second session of the Thirty-sixth Congress, begun and held at Washington on the 3rd of

December, 1860. This proposal of amendment was not ratified.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, that the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:" (Domestic Institutions.) Doc. His. of Const., Vol. 2, p. 516.

(f) The Thirteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress. The resolution read in part as follows:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:" (Thirteenth Amendment.) Doc. His. of Const., Vol. 2, p. 520.

(g) The Fourteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress. The customary form was followed:

> "Be it *Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses con-

curring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely:" (Fourteenth Amendment.) Doc. His. of Const., Vol. 2, p. 638.

(h) The Fifteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 27th of February, 1869, at the third session of the Fortieth Congress. Form of the resolution follows:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures shall be valid as part of the Constitution, namely:" (Fifteenth Amendment.) Doc. His. of Const., Vol. 2, p. 795.

(i) The Sixteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, at the first session of the Sixty-first Congress. In this resolution it is inferred and not expressed that the proposal was to the Legislatures of the several States:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein) that the following Article is proposed as an Amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:" (Sixteenth Amendment.)

(j) The Seventeenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress at the second session of the Sixty-second Congress. Again the submission to the Legislatures is inferred and not expressed:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that in lieu of the first paragraph of section three of article one of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, the following be proposed as an Amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of three-fourths of the States." (Seventeenth Amendment.)

(k) The so-called Eighteenth Amendment was submitted *to the States* by a joint resolution of Congress, passed on December 18th, 1917, at the second session of the Sixty-fifth Congress. This is the first proposal of Amendment ever submitted to the States. The material portion of the resolution reads as follows:

> "*Resolved* by the Senate and House of Representaitves of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following Amendment to the Constitution be, and hereby is, *proposed to the States*, to become valid as a part of the Constitution when ratified by the Legislatures of the several States as provided by the Constitution." (So-called Eighteenth Amendment.)

There can be no mistake as to the intent of the proponents of this so-called Amendment to submit it *to the States*, for their avowed purpose is to create a new agreement, a new relationship between the people of the United

States and the people of the respective States. To make that new relationship binding the people of the respective States must be made parties to it, and must be drawn in through the form of submitting the proposal to them. As an inducement to enter this new relationship the people of the respective States are promised "concurrent power." In the third paragraph of the so-called Amendment it is reiterated that the submission is "*to the States by the Congress.*" The entire procedure is revolutionary and without constitutional sanction. It surpasses all understanding that Congress while submitting the proposal *to the States* declares that their Legislatures shall bind them. When pray did Congress become the dictator over the sovereign people of a State with respect to their sovereign powers? Sovereignty resides in the people and they alone may express sovereign will.

(12) The Preservation of the States.

Sovereignty is the right to govern. All sovereignty in the last analysis resides in the people, but in our dual system of government sovereignty is divided. A portion of sovereignty resides in the people of the United States and all the residuum is retained by the people of the respective States. The sovereignty of a State is original and is independent of the Federal Constitution. In the exercise of their original sovereignty the people of a State have an inherent right to establish their form of government upon such principles as shall most conduce to their own happiness. This is the basis upon which the whole American fabric has been erected. The principles upon which the people of a State erect their government are deemed to be fundamental and are designed to be permanent. In the Constitution of Rhode Island it is declared in the words of

Washington in his Farewell Address: "The basis of our political system is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." R. I. Const., Art. 1, Sec. 1.

> "The people of the State created, the people of the State only can change, its Constitution." Mr. Justice Iredell, in *Chisholm* v. *Georgia, supra.*
>
> "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it." Mr. Chief Justice Marshall, in *Cohens* v. *Virginia, supra.*

The power of the people of the United States to amend their Constitution is undoubted, and the power of the people of a State to amend their constitution is equally clear. In the case of the so-called Eighteenth Amendment, however, the representatives of the people of the United States have gone beyond their jurisdiction and their powers and have attempted to amend not the Constitution of the United States but the constitution of every State in the Union. If the amending function is construed as coextensive with absolute sovereignty, then the basis of our political system is no longer the right of the people of a State to make and alter their constitution, for their political institutions are at the mercy of others and may be changed against their will. "It would be a novel and dangerous doctrine," said Mr. Madison, "that a Legislature could change the Constitution

under which it held its existence." *Farrand,* Vol. 2, p. 92. If officials may abrogate or fundamentally alter the form of government in State and Nation, to what end is it provided that Senators and Representatives in Congress shall be bound by oath or affirmation to support this Constitution and that each Senator and Representative in a State Legislature shall be equally bound by oath or affirmation to support the constitution of his State?

The preservation of the State governments, by protecting them against encroachment by the Federal Government, may be said to have been the chief concern of all the patriots who had any part either in the framing or the adoption of the Constitution. Their declarations of this purpose are without number and quotations may seem unnecessary. These few, however, will illustrate the spirit of all.

> Mr. Iredell, (N. C.): "I heartily agree with the gentleman, that, *if anything in this Constitution tended to annihilation of the state government, instead of exciting the admiration of any man, it ought to excite the resentment and execration. No such wicked intention ought to be suffered. But the gentlemen who formed the Constitution had no such object;* nor do I think there is the least ground for that jealousy. The very existence of the general government depends on that of the state governments." El. Deb., Vol. 4, p. 53.
>
> Mr. Hamilton, (N. Y.): "The state governments are essentially necessary to the form and spirit of the general system. As long, therefore, as Congress have a full conviction of this necessity, they must, even upon principles purely national, have as firm an attachment to the one as to the other. This conviction can never leave them, unless they become madmen. *While the Constitution continues to be read, and its principles known, the states must, by every rational man, be considered as essential, component parts of the Union; and therefore the idea of sacrificing the former to the latter*

is wholly inadmissible. * * * The gentlemen are afraid that the state governments will be abolished. But, sir, their existence does not depend upon the laws of the United States. *Congress can no more abolish the state governments, than they can dissolve the Union. The whole Constitution is repugnant to it.*" El. Deb., Vol. 2, pp. 304, 309.

Mr. Davie, (N. C.): "Mr. Chairman, a consolidation of the states is said by some gentlemen to have been intended. * * * *If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection,* I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government. The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government." El. Deb., Vol. 4, p. 58.

We assert that Congress in proposing and the Legislatures of the several States in ratifying the so-called Amendment have gone beyond their jurisdiction and their powers. The limitations of territorial jurisdiction are readily recognized; but the limitations of jurisdiction which are measured by delegated powers are not so easily discernible. "Were any one State of the Union to pass a law for trying a criminal in a Court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation." *Cohens* v. *Virginia, supra.* The Federal Government has no territorial jurisdiction within the boundaries of the State of Rhode Island, nor within the boundaries of any State of the Union. The operation of its powers within the limits of States is confined strictly to the powers delegated.

Beyond the powers delegated it is powerless and can assume no jurisdiction. In *Ableman* v. *Booth, supra,* the Supreme Court of the State of Wisconsin upon habeas corpus proceedings released the defendant, who was in the custody of a United States marshal under process from the Federal court. Mr. Chief Justice Taney observed with reference to jurisdiction:

> "This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. *But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further.* They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under the State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States."

So in the present case upon the first presentation of the proposal of the so-called Amendment Congress should have recognized that both the power involved and the subject matter dealt with in the Amendment was wholly within the dominion and jurisdiction of the States, and that they were powerless to pass over the line of division which separates the Federal from State jurisdiction. The proposal was void *ab initio.*

The power of police is an attribute of State sovereignty. It resides in the States exclusively and is necessary to their

existence as organized governments. There is no divided authority, either in respect to its possession or in respect to its exercise. The Federal Government has no police power. Each State is supreme in the possession and in the exercise of the power within its territorial limits. "That there is a plain repugnance in conferring upon one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which asserts the control, is a proposition not to be denied." *McCulloch* v. *Maryland, supra.* Even where the Federal Government and a State government possess a similar power, as in the case of the power to tax, a necessary implication will be raised to prevent either the Federal Government or a State government from impairing the existence and efficiency of the other. In *McCulloch* v. *Maryland, supra,* such an implication was raised to protect the Federal Government; and in *Collector* v. *Day, supra,* such an implication was raised to protect a State. In the latter case, Mr. Justice Nelson based his opinion upon the great law of self-preservation.

> "*In this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government.* And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In*

both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

In *McCulloch* v. *Maryland, supra*, Mr. Chief Justice Marshall said that if we measure a power residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. Then said he:

> "We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve."

If a power admittedly delegated to the Federal Government under the Constitution may be restrained by necessary implication because it tends to impair or destroy the existence of a State, and this implication arises by virtue of the great law of self-preservation how much more reason is there in construing the Constitution to exclude a principle of perpetual conflict that directly tends to the destruction of the States? If the police power residing in a State is to be measured by the extent of sovereignty which the people of a State possess with reference to it, then the measure of that power is full and complete. That a State is exclusively sovereign with respect to a power and at the same time may be deprived of that power against its will is utterly repugnant to all conceptions of sovereignty and to the spirit

of the Constitution. "That is a very narrow view of the Constitution," said Mr. Justice Wayne in the *Passenger Cases, supra*, "which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve or even disquiet the fundamental organization of either of the States."

In *Hammer* v. *Dagenhart*, 247 U. S. 251 (1917), Mr. Justice Day, speaking for the Court, observed:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters intrusted to the Nation by the Federal Constitution. * * * This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

In *Texas* v. *White*, 7 Wall. 700, 725 (1868), Mr. Chief Justice Chase wrote that memorable passage that should be our guidance for all time:

> "*But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States.* Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively or to the people. And we have already had occasion to remark at this term, that

'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *Lane Co.* v. *Oregon.* Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*"

And Mr. Justice Brewer, in *Keller* v. *United States*, 213 U. S. 138 (1908), thus emphasized the statement of Mr. Chief Justice Chase:

> "*We should never forget the declaration in Texas* v. *White*, 7 Wall. 100, 725, *that 'the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible states.'*"

The State of Rhode Island respectfully submits that the motion to dismiss its bill should be denied and that its prayer for relief should be granted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF RHODE ISLAND, COMPLAINANT, *v.* A. MITCHELL PALMER, ATTORNEY GENERAL, and Daniel C. Roper, Commissioner of Internal Revenue, defendants.	No. 29, Original.

BRIEF OF DEFENDANTS IN SUPPORT OF MOTION TO DISMISS.

Upon the presentation of the bill in this cause the court made an order directing the defendants to show cause why the bill should not be filed. In response to this rule, allusion was made to some of the matters hereinafter set up. The defendants, however, understand that the permission given to complainant to file the bill was intended, among other things, to allow a fuller presentation and discussion of the defendants' contention that the bill set forth no cause of action cognizable by this court and no grounds for relief. A motion to dismiss has been filed, and this brief is presented in support of the contention that the bill should be dismissed on its own statement of facts.

THE CASE.

The bill is filed by the State of Rhode Island against the Attorney General and the Internal Revenue Commissioner of the United States, who are alleged to be citizens of the States of Pennsylvania and South Carolina, respectively. The specific relief sought is an injunction against the enforcement of the provisions of an act of Congress, known as the Volstead law, for enforcing the eighteenth amendment to the Constitution, known as the prohibition amendment. The prayer for this relief is predicated on the claim that the act of Congress is unconstitutional and void. This act, however, is not assailed by the bill except upon the ground that the eighteenth amendment is itself unconstitutional and void. In other words, if the eighteenth amendment is now a part of the Constitution of the United States, no claim is made that the act of Congress passed to enforce it is unconstitutional. The sole question presented, therefore, is whether the eighteenth amendment is a part of the Constitution.

It is not denied that every step provided by Article V of the Constitution for the adoption of amendments has been regularly taken. It is distinctly alleged that Congress proposed the amendment in question to the legislatures of the States; that the legislatures of three-fourths of the States have ratified it; that the Secretary of State of the United States has proclaimed it to be ratified and a part of the Constitution; and that it has thus been proposed and ratified in exactly the

manner in which the Constitution provides that amendments shall be proposed and ratified. It is thus conceded to be now a part of the Constitution unless there is something in its nature or character which takes it out of the purview of Article V and places it beyond the power to amend the Constitution. The sole attack upon it is that the "power of police and economy with respect to the internal affairs of the State" was reserved to the States by the Constitution, and that it is therefore not within the power of Congress to propose or of three-fourths of the States to ratify an amendment which interferes with the full exercise by the States of this power with respect to the regulation of the liquor traffic.

MOTION TO DISMISS.

The motion to dismiss is based on the following grounds:

(1) Because the matters and things set up in said bill of complaint present no matter of a justiciable character between said complainant and these defendants, nor does it set up any subject matter properly invoking the jurisdiction of this court under the grant of judicial power to said court.

(2) Because the facts stated in said bill of complaint do not set up any cause of action.

(3) Because the said bill of complaint alleges no cause of action against these defendants or either of them.

(4) Because there is no equity in said bill of complaint.

CONTENTIONS OF DEFENDANTS.

The defendants contend that the motion should be sustained because—

(1) If a justiciable controversy can arise out of the facts alleged, it is a controversy wholly between individuals and corporations of the State of Rhode Island and these defendants or their subordinates and not a controversy to which the State of Rhode Island is a real party.

(2) The only controversy arising from the facts alleged, to which the State of Rhode Island is, in any sense, a party, is one over the right to legislate with regard to the liquor traffic—that is, a controversy between the State of Rhode Island, in its political capacity, and the United States, in its political capacity. The United States is the real defendant in that controversy; and if the question is justiciable, it can not be determined in a suit to which the United States is not a party and in which the only defendants are merely officials in the executive departments of the United States Government.

(3) The only question made against the eighteenth amendment is whether it is of such a nature that it could become a part of the Constitution by being proposed and ratified in the manner provided by the Constitution. This is a purely political, and not a justiciable, question which the Constitution has committed to the political branch of the Government and not to the courts.

(4) If the question above stated can be said to be justiciable, there is no merit in the complainant's

contention. Both by the language used and that proposed but rejected, the convention which adopted the Constitution made clear the intention that the distribution of the police powers between the Federal and State Governments was to be subject to alteration by amendment equally with other features of the Constitution.

I.

The fact that a State seeks to sue citizens of other States is not conclusive that the jurisdiction of this court is properly invoked. A controversy which is justiciable between the State and the defendants must be presented.

The bill, on its face, appears to be a suit between a State as plaintiff and citizens of other States and therefore within the original jurisdiction of this court. Constitution, Article III, section 2. The fact, however, that a State assumes to sue and names as defendants citizens of other States is not conclusive that this court must take jurisdiction. As said in *United States* v. *Texas*, 143 U. S. 621, 644, the judicial power of the United States over controversies to which a State is a party extends only to those cases "in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States." In other words, this court is not required by the Constitution to determine every question which a State may choose to submit to it. When a State chooses to become a litigant, it stands before the

courts like any other litigant, and can require the courts only to determine such controversies as can be properly litigated by individual litigants. The relief which it seeks must be such as the court is authorized to grant—that is, it must present a controversy which is justiciable in the courts of the United States. If it seeks to assert a right which the courts of the United States are not authorized to enforce, it must fail. Thus in *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, the State of Wisconsin had obtained in its own courts a judgment against a citizen of another State based upon a penal statute of Wisconsin. It sought to recover on this judgment in this court. There was clearly involved a controversy between a State and a citizen of another State. But because the enforcement of the right asserted would be to execute the penal laws of the State of Wisconsin and because the courts of no government execute the penal laws of another, this court declined to assume jurisdiction. The point was that, although a State was suing citizens of other States, the controversy presented was not justiciable in the courts of the United States.

Moreover, a State, like any other litigant, must be directly interested in and be a real party to the controversy before it can invoke the jurisdiction of this court. It can not maintain a suit against another State for the purpose of collecting bonds for the benefit of its citizens who are bondholders, although it may maintain such a suit on

bonds owned by itself. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *South Dakota* v. *North Carolina*, 192 U. S. 286. It can not maintain a suit to enjoin officers of another State from enforcing the laws of the latter State because those laws invade the constitutional rights of its citizens. *Louisiana* v. *Texas*, 176 U. S. 1, 16, 24–25. In such cases this court refuses to assume jurisdiction because the State is not directly and really a party to the controversy and can not invoke judicial action by making the case of its citizens its own and thus suing in vindication of grievances of particular individuals.

It is true that where parties outside the limits of a State, and therefore without the jurisdiction of its courts, commit acts the result of which is to create a public nuisance within the State and to menace the public health, the State may maintain a suit against such parties. But this is because the State itself is charged with the duty of protecting the public health, and is interested directly in abating such nuisances or preventing the illegal acts. The wrongs complained of are thus wrongs against it, and the controversy is one as to which it can fairly be said to be a real party. *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. Indeed, as said in the case last cited, jurisdiction of such cases may be maintained upon the ground that the State, in its capacity of quasi sovereign, "has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain." In

other words, the State, as a State, is a real party to the controversy.

Again, if there is a controversy to which the State is a real party, that controversy must be of a justiciable rather than of a political nature before the jurisdiction of this court can be invoked. *Luther* v. *Borden*, 7 How. 1; *State of Mississippi* v. *Johnson*, 4 Wall. 475; *State of Georgia* v. *Stanton*, 6 Wall. 50; *Pacific Telephone Company* v. *Oregon*, 223 U. S. 118.

It also goes without saying that if the controversy is one, in fact, between the State and the United United States no suit can be maintained unless the United States has given its consent to be sued, nor can the lack of such consent be avoided by naming as defendants any official or officials of the United States. *United States* v. *Louisiana*, 123 U. S. 32, 36; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68.

II.

The State of Rhode Island is not a real party to the controversy presented.

The only relief sought is an injunction against the enforcement of the act of Congress known as the Volstead law. It is, in substance, alleged that, under the direction and control of the officials named as defendants, their subordinates will, if not enjoined, proceed to enforce the Volstead Act within the State of Rhode Island by arresting and prosecuting individuals and seizing property of private individuals and corporations as provided in that law. It is not

alleged that they will interfere in any way with officials of the State in the discharge of their duties, or that they will seize any property in which the State has a proprietary interest. An injunction is sought upon the ground that the defendants are without lawful authority to direct such action by their subordinates against private persons or their property, for the reason that the Volstead law is unconstitutional because the eighteenth amendment is itself invalid. In effect, it is charged that if the injunction is not granted the defendants will, in Rhode Island, commit trespasses against the persons and property of individuals and corporations in that State. The prevention of this is the sole relief sought. A decision of the question as to the validity of the Volstead law becomes necessary only when the right of Rhode Island to litigate to prevent such action is first sustained.

Can the State, of right, maintain a suit in any court to protect these private rights? If the Volstead Act is unconstitutional, and therefore the Federal officials have no authority to make arrests or to seize property, their action in so doing may, under the laws of Rhode Island, be a criminal trespass. The only way in which a State ever undertakes, by ligitation, to protect the private rights of its citizens is to prosecute and punish, under its own criminal laws, offenders who invade those rights. If, therefore, the State conceives that the eighteenth amendment is invalid, and the acts which are about to be done thereunder can not be justified, it may, if it has a law against criminal tres-

pass, prosecute the persons who commit such acts, and refuse to recognize the eighteenth amendment as a justification. But if an injunction is sought, only those directly affected in person or property can complain.

The citizens of Rhode Island are as much citizens of the United States as they are of that State, and equally subject to its law. It has never been supposed heretofore that a State possessed any right or owed any duty to defend its citizens against criminal prosecutions in the courts of the United States, or to assert, for them, the rights which they may assert in those courts; much less to prevent such prosecutions. Any citizen arrested under a law of the United States has the right to challenge the constitutionality of that law. But it would be an anomaly in government if, when a person is a citizen of two governments, and owes allegiance to both alike, one of those governments can challenge the right of the other to proceed under its own laws against such citizen and to enforce against him its criminal laws. And this is exactly what this bill attempts to do. The United States may proceed against its own citizens who happen to live in the State of Rhode Island under a law enacted by Congress. Whether that law is a valid law and enforceable, is a question which will arise solely between the United States and its own citizens. It is inconceivable that, merely because the accused person is also a citizen of Rhode Island, that State, even before he is called on to obey, may assume the burden of defending him or his property against a proceeding in

courts of the Federal Government, of which Rhode Island is a part, and to whose laws he is subject.

The question, at last, is, shall private citizens be arrested and private property seized in the State of Rhode Island under a statute enacted by Congress? The real parties to this controversy are the persons who are to be arrested or the owners of the property which is to be seized. These persons may freely challenge the validity of the laws, and the courts of the United States are open to them for that purpose. The State, unless all ideas of the relation of the citizen to the Federal Government which have heretofore prevailed have been misconceived, and unless the repeated decisions of this court above referred to are to be overruled, has no right to go into the Federal courts of the United States and, in its own name, fight the battles of those who are common citizens of it and of the United States. The State of Rhode Island has no right to invoke the jurisdiction of any court to enjoin the enforcement of the criminal laws of the United States which affect those who are citizens of both Governments.

It is respectfully submitted that the controversy over which the jurisdiction of this court is now invoked can be properly determined in the Federal courts, if ever, only in an actual case arising between the United States and those who have come in conflict with the law in question.

This argument does not overlook the allegation that the Volstead law will destroy a business from which the State has been accustomed to derive a large

revenue. Under our system, the power to tax attaches to that which exists. It does not include the right to create or protect something belonging to another for the purpose of taxation. The right to carry on a particular business, when it exists, belongs to the individual and not to the State. The right of the State to tax exists only when the individual chooses to carry on the business. When, therefore, the carrying on of a business is prevented, even by unlawful means, it is the property right of the individual and not that of the State which is invaded. If a person owning property or conducting a business should determine to yield to the Federal law without resistance, Rhode Island would have no right to complain, even though it thereby lost the opportunity to levy taxes thereon. If he voluntarily chose to destroy his property or cease to carry on his business, Rhode Island would have no right to object, though her future taxes would thus be diminished.

When Congress imposed a heavy tax on the manufacturer of colored oleomargarine, the tax was assailed on the allegation that it would destroy the business. On this allegation, the manufacturer, though unsuccessful in the end, had the clear right to invoke a determination by the courts of the validity of the act of Congress. But it is apprehended that no one would have insisted that, because the result of the tax would be to prevent the carrying on of a business from which the State could collect taxes, the State would have a standing in court to test the constitutionality of the Federal tax. So,

when, under the guise of the power to regulate interstate commerce, Congress passed a child-labor law, individuals whose interests were adversely affected successfully attacked the law. In that case, an unconstitutional law was involved, and a State in which manufacturers employed child labor might, with perfect truth, have alleged that the operation of that law would so adversely affect the prosperity of manufacturers as to affect the revenues that the State derives from that source. But surely it can not be contended that, for this reason, the State would have the right to contest in court the constitutionality of the law. The Federal Government derives very large revenues from the incomes of individuals and corporations within the States. It is entirely conceivable that a State may enact laws the effect of which will be to greatly decrease the net incomes of the citizens and the corporations within its borders. If the act so enacted is unconstitutional, those whose incomes are affected will have the right to have it declared void by the courts. But it would require a great stretch of the imagination to say that the rights of the Federal Government would be so invaded that that Government could properly invoke the jurisdiction of the courts and have the State law declared unconstitutional.

Again, the Federal Government has from the beginning derived a large part of its revenues from taxes upon the manufacture and sale of intoxicating liquors. State after State has passed laws prohibiting the manufacture and sale of such liquors. So

far as these laws have been made effective, the revenues which the United States would otherwise have collected have been cut off. The courts have been open to the men engaged in the liquor business to contest the validity of these laws, but no one has ever supposed for a moment that the United States could go into any court and assail such laws, even if invalid, merely because the result of their enforcement would be to prevent it from longer collecting taxes which it had been accustomed to collect from those engaged in the business. No more can the State of Rhode Island become a litigant to prevent the enforcement of a Federal prohibition law because it destroys a business from which that State had expected in the future to derive a revenue. The motion should, therefore, be sustained because the State of Rhode Island is not a real party in interest.

III.

The only controversy to which the State of Rhode Island can be said to be a party is a controversy between it and the United States over the right to legislate in regulation or prohibition of the liquor traffic. Such a controversy can not be determined in any event when the United States is not a party to the suit.

It will be conceded, of course, that the United States has not consented to be sued in this action. If, therefore, the real controversy which the State of Rhode Island seeks to have determined is, in fact, one between it and the United States, the bill, of

course, must fail for want of necessary parties. We have seen that, for the purpose of restraining the arrests of persons or seizures of property, the real party in interest is not the State whose citizen is thus affected, but the person arrested or whose property is seized. Indeed, it would scarcely be suggested by anyone that a State can properly become a party litigant in the courts of the United States to redress a wrong committed by an ordinary trespasser against the person or property of one of its citizens. It is asserted, however, that in this case the effort will be to justify the proposed acts of which the bill complains under a law of Congress, and that Congress, by the passage of that law, has usurped legislative power which belongs exclusively to the States. In other words, the State of Rhode Island claims that Congress has invaded her political rights. No right which the State could assert as a litigant will be invaded by seizing, within its bounds, either persons or property of individuals. The only complaint is that her legislative power over individuals and their property is thus interfered with by the United States.

Legislation is the exercise of a political function. In the exercise of this political function, neither the legislature of Rhode Island nor the Congress of the United States can be restrained. When legislation has been enacted by either, the courts may determine, when necessary to the decision of a case, whether it is in violation of the Constitution. But

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where both Congress and a State legislature claim the right to legislate on the same subject, it has always been supposed that the only way by which their respective rights may be judicially determined is for some person whose private rights are affected to challenge, in the proper court, the constitutionality of the obnoxious legislation. In this case, when an arrest is made, or private property is seized in the State of Rhode Island, a controversy will arise between the United States and the person arrested or whose property is seized. Such person may then challenge the constitutionality of the act of Congress in question, and the courts will then determine whether Congress had the constitutional right to enact the Volstead law. But the State of Rhode Island now seeks, in advance of any such actual controversy, to submit to this court, in its own name, the question of the respective rights to legislate of her legislature and of the Congress of the United States. This is the only controversy to which, in any sense, she is a party.

But her legislative rights have not been infringed. If the individuals named as defendants do the things which it is alleged they will do, those things can not in any way interfere with the passage of any legislation which the legislature of Rhode Island may see fit to pass. If legislation is had which conflicts with the eighteenth amendment, any individual who claims rights affected by such legislation may have a determination by the courts as to whether the State law is valid. If the legislative rights of Rhode Island

have been invaded, they have not been invaded by the defendants named in the bill but by the Congress of the United States. For these reasons, it would seem to be beyond doubt that the question presented by the bill, if justiciable at all, is not so at the instance of the State. But if we assume that it is a justiciable question, in the sense that a State may, under the circumstances here set up, litigate it, with whom is the controversy? Plainly, it is not with the defendants named, but solely and alone with the United States. A State can not, any more than other litigants, have questions in which it is interested determined by the courts without bringing into the court the necessary parties. Confessedly, it can not bring into this court the United States, and, in any possible view of the case, its suit must fail for want of necessary parties.

IV.

The nature and propriety of any amendment, other than those prohibited by Article V, are left to the decision of the Congress as the proposer and the legislatures specified as the ratifiers.

Since the case turns, at last, on whether Congress has the power to propose and the legislatures of three-fourths of the States to ratify an amendment of this kind, the question arises, have the courts jurisdiction to determine the character of amendments which may be adopted? Apparently, the contention of the complainant is that all that is necessary in order to invoke the jurisdiction of the Federal courts is to

assert that something has been done which the Constitution does not permit to be done, without regard to the nature of the violation asserted. The fallacy in the contention is in assuming that the courts are given a general supervisory jurisdiction over all of the departments of the Government, and that the determination of all questions as to the legitimacy and exercise of the powers committed to the other departments of the Government by the Constitution rests with the judiciary. The truth is that the Constitution, in dividing the powers of the Government, left to the *final* decision of the political branch of the Government many questions that may arise out of the Constitution. Indeed, the jurisdiction to declare unconstitutional an act of Congress was not, in express terms, conferred upon the courts, and arises, by necessary implication, from the necessity to determine what the law involved in a particular case is in order to decide the case. It is only when, in seeking to ascertain what is the law governing a litigated matter, the courts find that a statute relied on is the exercise of a power prohibited or not conferred by the Constitution that they declare such act unconstitutional. This has clearly been understood to be the ground of the jurisdiction ever since it was said in *Marbury* v. *Madison*, 1 Cranch 137, 176:

> It is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict

> with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

The courts accordingly inquire into the *power* of Congress to act and not into the *policy* of the legislation enacted. It must also be remembered that among the framers of the Constitution were many men who were inclined to fear the conferring of too much power on the courts. Certain it is that many questions which may arise under the Constitution can never become the subject of determination by the courts. The determination by the political branch of the Government of many questions is therefore accepted and followed by the courts. The Constitution in Article IV, section 4, provides that the United States shall guarantee to every State a republican form of government and shall protect each State against invasion and, on application of the legislature or the executive, against domestic violence. But it is now thor-

oughly settled that this court can never be called on to determine whether a particular State Government is republican in form or whether conditions exist which require the Federal Government to protect the State against invasion or domestic violence. It has been held that these are all matters which must be determined by the legislative or executive branches of the Government and such decision must be accepted and followed by the courts. Thus, when, in Rhode Island, there were two governments, each claiming to be the real government of the State, the court said after quoting the provision of the Constitution:

> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. (*Luther* v. *Borden*, 7 How. 1, 42.)

And in the same case it was said:

> It rested with Congress, too, to determine upon the means proper to be adopted to fulfill

> this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that the President should determine. (Id. 42–43.)

And again:

> By this act, the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. (Id. 43.)

And still again:

> Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. (Id. 45.)

So, when the referendum laws of one of the States were assailed upon the ground that they destroyed a republican form of government, the court held that the question was a political one and not justiciable. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. And in the cases of *State of Mississippi* v. *Johnson*, 4 Wall. 475, and *State of Georgia* v. *Stanton*, 6 Wall. 50, certain acts of Congress were assailed upon the ground

that their effect was to absolutely destroy the State governments of Mississippi and Georgia. It will be noted that these cases involved to an extreme degree the question sought to be presented here. There the allegation was that the result of the act of Congress was to take from a State government *all* of its power, legislative and otherwise. Here the allegagation simply is that it takes from the State a small part of its police power. In the cases referred to, however, the court held that the questions could not be determined because they were political and not justiciable.

Again, the Constitution prescribes, in clear and express terms, the qualifications which shall be possessed by the Members of Congress. It, however, provides that each House shall be the judge of the qualifications and elections of its own Members. A House of Congress may expel a Member upon the ground that he is disqualified, when, in fact, he possesses all the qualifications named in the Constitution. Its power may be thus exercised in the most arbitrary manner, but it has never been supposed that the courts could review the action. A House of Congress may also, in open disregard of the facts, declare one man elected when another has been elected, but no one would claim that the controversy can be transferred to the courts for decision, for the reason that each House of Congress, and not the courts, has, by the Constitution, been made final judge in such matters. Again, the Constitution provides, in effect, that the Congress shall count the votes cast for Presi-

dent and Vice-President and determine the result. There is nothing in the Constitution which, in terms, says that this decision by Congress shall be final, but it is apprehended that no one would claim that the courts could be called on to assume jurisdiction and review that judgment. Indeed, it once happened that there was a most serious controversy over the election of a President, and Congress created a special tribunal by which the disputed questions were determined, and on whose report Congress announced the result of the election. While some doubted the constitutionality of this procedure, it was never supposed that the question of its constitutionality was one which could be determined by the courts.

The Constitution contains some very specific provisions as to the manner in which acts of Congress shall be passed. And yet this court has determined time and again that when an Act has been signed by the Speaker of the House, the presiding officer of the Senate, approved by the President, and deposited with the Secretary of State it is finally determined that it has been passed in accordance with the Constitution, and the courts can not look to the journals or other documentary evidence and determine that it was not constitutionally passed, or even that, as signed by the presiding officers and the President, it was not, in fact, the bill which passed. Thus in *Field* v. *Clark*, 143 U. S. 649, 680, it was said:

> We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from

> the reports of committees, or from other documents printed by authority of Congress, that the enrolled bill designated H. R. 9416, as finally passed, contained a section that does not appear in the enrolled act in the custody of the State Department.

And in *Harwood* v. *Wentworth*, 162 U. S. 547, 562, it was said:

> We see no reason to modify the principles announced in *Field* v. *Clark*, and, therefore, hold that, having been officially attested by the presiding officers of the Territorial Council and House of Representatives, having been approved by the Governor, and having been committed to the custody of the Secretary of the Territory, as an act passed by the Territorial Legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be unimpeachable by the recitals, or omission of recitals, in the journals of legislative proceedings which are not required by the fundamental law of the Territory to be so kept as to show everything done in both branches of the legislature while engaged in the consideration of bills presented for their action.

And in *Flint* v. *Stone Tracy Co.*, 220 U. S. 108, 143, it was said:

> In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department.

Many other instances could be cited of provisions in the Constitution which give rise to questions the determination of which is committed wholly to the political branch of the Government and which can never be the subject of judicial inquiry. The question of what amendments may be proposed by Congress and ratified by the legislatures of three-fourths of the States is clearly one of these. The right and power to propose amendments exist, according to the very letter of the Constitution, whenever two-thirds of the Members of each House of Congress deem them necessary. The proposal, by the required vote, of an amendment is a determination that the necessity exists and is, therefore, a constitutional exertion of power.

V.

The only limitations on the constitutional power of the Congress to propose, and of the legislatures to ratify, by the majorities therein named, amendments to the Constitution under Article V are those expressed in that article.

In the present case, the question is whether a constitutional amendment making the liquor traffic unlawful in the United States, proposed by Congress in the regular way, ratified by the legislatures of three-fourths of the States in the regular way, and proclaimed by the Secretary of State as required by an Act of Congress, is a valid amendment. Article V of the Constitution provides for the proposal of amendments. Its provisions are, in substance, that—

(1) Congress whenever two-thirds of both Houses shall deem it necessary shall propose amendments to the Constitution; or, on the application of the legislatures of two-thirds of the several States, Congress shall call a convention for proposing amendments.

(2) In either case, the amendments proposed shall be valid to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

These are the only provisions, except that no amendment which may be made prior to the year 1808 shall, in any manner, affect the provisions contained in the first and fourth clauses of the ninth section of the first article of the Constitution, relating to the migration or importation of slaves and the levying of capitation or other direct taxes, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

The sole question, of course, is whether Congress had the power to propose the amendment in question. The court is not concerned with whether the proposal involved a wise or an unwise policy. If there is any limitation upon the character of amendments that may be adopted, this limitation must be found, either expressed or implied, in the Constitution. Except as so limited, every provision in the Constitution and every amendment thereafter adopted were, by Article V, made subject to change

or amendment. There is no reference elsewhere in the Constitution to the subject of amendments. In Article V the framers of the Constitution enumerated the matters which they thought necessary to withdraw, either wholly or for a time, from the amending power. There was but one subject upon which they thought it necessary to deny, for all time, the right of amendment without the consent of the States affected. The restrictions which, as above shown, were to be in effect only until 1808 are, of course, no longer operative. The sole limitation as to the character of amendments now to be found in the language of the Constitution is that no State shall be deprived of its equal suffrage in the Senate without its consent. When the framers of the Constitution thus carefully excepted from the general amending power certain subjects, it can not be doubted that, aside from these exceptions, it was intended that Congress should have the power to submit any amendment which it might deem necessary. It would seem impossible to draw from the language used any other limitation upon the power to amend than that expressed in Article V.

It is not to be supposed that any one would contend that it was contemplated that no amendment should ever be adopted which would take away from the States any of the powers which were reserved to them by the original Constitution. It is not apprehended that so broad a claim as this is made in the present case. The claim seems to be limited to an insistence that the amending power does not extend

to the distribution of the "power of police and economy with respect to the internal affairs of the State," which, it is asserted, can not be taken away from any State without its consent.

It has been seen that no language can be found in the Constitution which singles out and puts in a class to itself this or any other power of the State as being above and beyond the power of amendment. The language used in Article V is obviously not susceptible of such a construction. But if this language, as used, could give rise to any doubt, the purpose of the convention not to draw such a distinction becomes clear when we examine the language which the convention rejected and refused to use. The proceedings of the convention, and the debates therein, show that the members of the convention considered the power of amendment unrestricted as to subject matter, except in the particulars stated in the article itself, and so understanding it, they declined to place upon it the very restriction which the argument advanced in behalf of the complainant in this case would impose.

Speaking to a proposal that, on application of the legislatures of two-thirds of the States for an amendment to the Constitution, the legislature of the United States should call a convention for that purpose Mr. Gerry said:

> This Constitution is to be paramount to the State constitutions. It follows, hence, from this article, that two-thirds of the States may obtain a convention, a majority of which can bind the Union to innovations that may subvert the State constitutions altogether. He asked

whether this was a situation proper to be run into.

Mr. Hamilton seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State legislatures will not apply for alterations, but with a view to increase their own powers. The National Legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

Mr. Madison moved an article covering amendments in the following language:

> The Legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the

legislatures of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States.

Mr. Hamilton seconded the motion.

Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it. In order to obviate this objection, these words were added to the proposition: "Provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article."

(Madison's Papers, pp. 531–532.)

When the draft of the Constitution was finally under consideration, Article V, providing for amendment, was submitted in the following form:

"The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose, amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of Article I."

Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States; as abolishing then altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended, so as to provide that no State should be *affected in its internal police*, or deprived of its equality in the Senate. (*Italics ours.*)

Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

Mr. Gouverneur Morris and Mr. Gerry moved to amend the article, so as to require a convention on application of two-thirds of the States.

Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments except only that difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided.

The motion of Gouverneur Morris and Mr. Gerry was agreed to.

(Madison's Papers, pp. 551–552.)

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From the Journal of the Convention, which details its action on the adoption of the proviso to Article V, the following appears:

> It was moved and seconded to annex to the end of Article V a proviso—
> "that no State shall, without its consent, *be affected in its internal police*, or deprived of its equal suffrage in the Senate." (Italics ours.)
>
> Passed in the negative.
>
> *Yeas:* Connecticut, New Jersey, Delaware, 3. *Nays:* New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, 8.
>
> It was moved and seconded to strike out Article V.
>
> Passed in the negative.
>
> *Yeas:* Connecticut, New Jersey, 2. *Nays:* New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, 8. *Divided:* Delaware, 1.
>
> It was moved to strike out of Article V, after the word "legislatures," the words "of three-fourths," and also, after the word "conventions," so as to leave future conventions to act like the present Convention, according to circumstances; which passed in the negative.
>
> It was moved to strike out the words "or by conventions in three-fourths thereof;" which passed in the negative.
>
> It was moved to annex to the article a further proviso—
> "that no state shall, without its consent, *be affected in its internal police*, or deprived of its equal suffrage in the Senate." (Italics ours.)
>
> Passed in the negative.

> It was moved to strike out the 5th Article altogether; which passed in the negative.
>
> It was moved to add a proviso—
>
> "that no state, without its consent, shall be deprived of its equal suffrage in the Senate;" which passed in the affirmative.
>
> (Vol. 1, Elliott's Debates, pp. 316–317.)

Several other amendments, not necessary to be particularly noted, were proposed and all defeated, whereupon Article V in its present shape was accepted.

Immediately following occurs this statement on the Journal:

> On the question to agree to the Constitution as amended, it passed in the affirmative—ALL THE STATES CONCURRING.
>
> *Ordered*, That the Constitution be engrossed.
>
> The house adjourned.
>
> (Vol. 1, Elliott's Debates, p. 317.)

Looking thus for light upon the intention of the convention, both to the language employed and that rejected, it would seem that the result has been accurately stated by a text writer thus:

> In scope, the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate. (Willoughby on the Constitution, sec. 227.)

If an amendment should be proposed changing the equal representation of the States in the Senate, and such amendment should be ratified by three-fourths of the States, the court could, of course, say that the amendment was invalid, for the reason that the Constitution itself provides that no such amendment

shall be adopted without the consent of all the States. The *power*, therefore, of Congress and of the legislatures of three-fourths of the States would be entirely wanting, and the court could properly so hold. But since the Constitution places no other limitation upon the power to amend, it can not be said that the question of what amendments may be adopted is anything but a purely political one. The amendments which it is thus expressly provided may be proposed, are those which Congress and not the courts deem necessary. This court has held that the Congress is the final judge of whether a State has a republican form of government. It is likewise the judge whether a proposed amendment is so inconsistent with the fundamental principles of our republican Government that it can not, or ought not, become a part of the Constitution. The only controversy presented by the bill is one which, on account of its nature and character, this court can not properly be called upon to decide, no matter who may be the parties to it.

VI.

The adoption of an amendment in the constitutional way can not be said to impose anything upon a State without its consent.

The contention that the States ratifying are imposing their will on the nonratifying States without their assent is erroneous. By acceding to the Constitution, Rhode Island, through her convention, representing her sovereignty, agreed that the Constitution might be altered in any particular save as specified in Article V.

The effect of the Constitution and this Article V as an express conferring of authority from the peoples of the States in their sovereign capacity, as well as the people of the United States, has been clearly expressed by this court. In the leading case of *Dodge* v. *Woolsey*, 18 How. 331, 348, after deciding that the Constitution is supreme over all of the departments of the Government, this court continues:

> It is so, to the extent of its delegated powers, over all who made themselves parties to it; States as well as persons, within those concessions of sovereign powers yielded by the people of the States, when they accepted the Constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both Houses shall propose them; or where the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. The same article declares that no amendment, which might be made prior to the year 1808, should, in any manner, affect

> the first and fourth clauses in the ninth section of the first article, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate. The first being a temporary disability to amend, and the other two permanent and unalterable exceptions to the power of amendment.
>
> Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it. (*Dodge* v. *Woolsey*, 18 How. 331, 348.)

All the States having consented to be bound by any duly proposed amendment which might be ratified by the legislatures of three-fourths of the States, every amendment so adopted is therefore adopted with the consent of every State in the Union.

VII.

There is no merit in the contention that the amendment is one which was not within the contemplation of the framers of the Constitution.

If the courts had jurisdiction to review the action of Congress and the legislatures of the States in determining that a particular amendment is proper and should become a part of the Constitution, there is still no merit in the present contention. If that contention was sound, it would have resulted in a

very different history of the American Government. There would have been no power in the Federal Government to-day to prevent slavery in any State which chose to recognize it as lawful. The Federal Government would have been equally powerless to confer upon the negro full rights of suffrage. The numerous rights secured through the various provisions of the fourteenth amendment would have been impossible. But the contention is manifestly unsound. The Constitution of the United States was adopted by the original States which ratified it. These States, at the time of its adoption, possessed all the powers of sovereignty. The reason for forming the Union was the necessity for a general government which could, in the very nature of things, exercise certain powers of government for the benefit of all the people better than those powers could be exercised by the several States. In order to form a Union, an agreement among the States as to the powers of the General Government was necessary. The General Government could have no powers except such as the States agreed that it should exercise. The States could confer no power except by surrendering or transferring some of the powers which, as sovereign States, they then had the right to exercise. It was a matter of agreement between them as to how all the powers should be divided between the Federal Government and the States. This agreement was the Constitution of the United States and created a Government. After that Constitution was adopted, the States remained sovereign States, but they had voluntarily

denuded themselves of many of the usual powers of sovereignty. Thus, they agreed to section 10 of Article I that—

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Many other powers were conferred upon the Federal Government. It may be assumed that the framers of the Constitution divided the powers of Government between the States and the Federal Government in the manner then believed to be necessary. They recognized, however, that, as time went on, changes might be found to be necessary, and, for this reason, they inserted Article V, providing for amendments. If they had intended that any part of the powers then reserved should never be taken from the States without unanimous consent, they would undoubtedly have used language to express such an intent. In the very nature of things, almost any amendment that could be adopted would take either from the States or the Federal Government some of the powers belonging to them, respectively, under the original Constitution. There is nothing to indicate an intention that amendments should be confined to one class or the other. Manifestly, the purpose was to leave the States free to make amendments of either class that they saw fit. Whatever

power to amend was given was not, in the last analysis, conferred upon the Federal Government. That Government is utterly powerless to amend its Constitution by any act of its own. The sole power conferred upon it in this regard is the power of Congress to propose amendments to State legislatures or conventions. Unless these legislatures or conventions in three-fourths of the States see fit to ratify, the proposed amendments remain nothing but scraps of paper. The States have reserved further power to themselves by providing machinery for themselves proposing amendments. They have, therefore, by Article V, reserved to themselves the power to amend the Constitution. The original Constitution, of course, was binding only on the States that agreed to it; but, on acceding to this agreement, those States and all other States which have since come into the Union have conferred express authority for this method of amending. The idea of the framers of the Constitution was that to require the unanimous ratification by the States would give to an inconsiderable minority undue power in the proposed government.

What has been said above is in accord with the practice since the beginning of the Government. That amendments to the Constitution have taken from the States powers theretofore considered as relating to their internal affairs is perfectly evident. When the Constitution was adopted, slavery was considered a matter of internal regulation and subject to the police power of each State. The temporary restrictions in Article V, prohibiting amendments prior to the year 1808, of the first and fourth

clauses of section 9 of Article IV were intended to suspend the powers of the Federal Government in relation to commerce and taxation because of their possible effect on the internal policy of certain of the States. And yet by the thirteenth amendment, adopted thereafter, under the provisions of Article V, slavery was made unlawful in all of the States.

The fourteenth amendment invaded the governmental rights of the States far more than any other amendment now existing. Before its adoption each State completely controlled the right to provide for due process of law, or various rights of persons in her jurisdiction under the law. A few restrictions had been placed on the legislative powers of the States affecting individuals; but the provisions of the amendments 1 to 10 did not apply to State power. The fourteenth amendment directly fettered the State in its power to legislate or act in respect to individual rights of citizens and persons where before it had such power. It divested each State of powers which under the tenth amendment had previously been reserved to the States.

When the Constitution was adopted, the right to prescribe who should be voters was exclusively a State matter. The qualifications of voters in the several States differed. The fourteenth amendment, as construed by this court, left each State still in the control of the power to prescribe who should be its voters. The effect of the State's laws might alter its representation in Congress, but it could restrict or enlarge the qualifications for the suffrage at its pleasure. Even now, by the laws of some States,

women are voters with all the rights incident thereto, while in others they are not.

The fifteenth amendment directly restrains the right of the State to regulate suffrage, not only as to national elections but as to strictly internal elections.

The proposed woman suffrage amendment, if ratified, will further diminish the formerly exclusive authority of the States. Those States which do not ratify will be compelled, under the view of complainant, to receive a new class of voters into their domestic body politic, and thus be deprived of a power which was exclusively theirs when the tenth amendment was adopted.

Yet in each of the above instances no infringement of the rights of the States under the Constitution has taken place; but by procedure, had in accordance with the express authority given by each State separately when it, either as one of the original 13, or since, acceded to the Constitution, a change has been made by which further power has been delegated from the State to the Federal Government, and therefore the mandate of the tenth amendment has been observed, and the only powers, of which the State is in this way deprived, are powers which are by the Constitution expressly conferred upon the United States. This is true, because Article V expressly enacts that an amendment proposed and ratified as therein provided, "shall be valid to all intents and purposes, as part of this Constitution."

Indeed, one of the controlling reasons for adopting Article V was to make it possible to take from the States and confer upon the Federal Government

such further powers as experience should show to be necessary. As said by Mr. Justice Brewer in *Kansas* v. *Colorado*, 206 U. S. 46, 90:

> The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated.

Accordingly, time and again, when a question has become of such general importance as that three-fourths of the States believe that it can be best dealt with by the Federal rather than by the State governments, the power to so deal with it has, by amendment to the Constitution, been conferred upon the Federal Government, although the power so conferred had previously been regarded as exclusively a part of the reserved powers of the States.

It was through just such a process that the eighteenth amendment finally became a part of the Constitution. The liquor traffic for many years was a recognized institution, and, while held subject to regulation, was lawful in all the States. The States themselves began, in the exercise of their police powers, to prohibit it. Such action on the part of the States was assailed as unconstitutional, because interfering unduly with individual rights. This contention, however, was given no countenance by the

courts. Finally, more than a majority of the States had prohibited the liquor traffic within their borders. But the experience of the States had been that the efficient enforcement of their prohibitory laws was beset with many difficulties. At the outset, it was held that the sale in original packages of liquor shipped from other States could not be prohibited, because such a prohibition encroached upon the power of Congress over interstate commerce. Congress afforded such relief as it could by the exertion of its regulatory powers over interstate commerce. The Wilson Act, the Webb-Kenyon Act, and the Reed amendment were passed and greatly aided in the enforcement of State laws. Finally, however, the opinion prevailed that this was a subject of such general interest and concern that a common policy for the entire country and direct power in the Federal Government to act on the subject were essential. Accordingly, Congress deemed it appropriate to propose an amendment to the Constitution, and this amendment has been ratified. We will look in vain for any provision in the Constitution under which it can be said that three-fourths of the States may destroy the control of the State governments over slavery, and yet that this same number of States, by ratifying another amendment, can not destroy, in the same way, the exclusive control of the States over the liquor traffic within their borders.

The control, or the prohibition, of the liquor traffic is now conceded to be a legitimate governmental function. It can not now be maintained, as a legal proposition, that such governmental regulation or

prohibition unconstitutionally infringes the rights of the individual. The right to prohibit such traffic was a part of the governmental powers which the States had when they framed the Constitution of the United States. It is a part of the powers which the States, at that time, reserved to themselves; but it is no more sacred than any power then reserved. Had it then been deemed proper to vest such power in the Federal Government, no one would now deny its existence or the right of that Government to exert it, and it is, therefore, a part of the powers which, by Article V of the Constitution, they agreed might be delegated to the United States to be exercised for the general welfare whenever three-fourths of the States should think such transfer necessary.

The power to amend means the power to change or alter. Any change that is made in the Constitution must introduce something that is more or less inconsistent with what was already in the Constitution. Otherwise there would be no occasion for the amendment. The right of Congress to submit amendments can not depend upon whether the proposed change is slight or grave. Every State in the Union is a party to the agreement that whatever change in the Constitution is proposed by Congress, as prescribed, and is adopted by the legislatures of three-fourths of their number, shall be thus adjudged to be a proper and needed amendment.

It is idle in this case to suggest that this power of amendment might be used to change the form of the Government. This amendment suggests no such thing. It simply transfers a power exercised by the

State governments to be exercised by the Federal Government. It leaves the structure of the State governments and their general purposes and those of the Federal Government unaltered. It is not like a proposition to change the form of the Government, as, for instance, to vest the executive power in a cabinet, like the English Cabinet, composed of Members of Congress and dependent on commanding the support of a congressional majority, thus changing the powers of the Executive. It is not radical, as would be a change which subjected all State laws to approval or disapproval by Congress. Changes such as these might be deemed revolutionary; but to protect against these the Constitution relies on the wisdom and patriotism of the Congress and of the States and on the requirement that it takes two-thirds of the first to propose and three-fourths of the last to determine what amendments shall be made.

The Constitution makers were fresh from having to amend the Articles of Confederation into the "Constitution" for a Government for the United States. The embarrassments of a want of provision for such radical change had been most acute. The new scheme was deemed by every one an experiment. The ability to change it in any way needed to meet the future, without requiring unanimity, was deemed essential and was thus provided for; the proviso to Article V yielding only such exceptions as were most needed to secure the adoption of the article. The test which the Constitution lays down as to whether amendments shall be proposed and what they shall

be, except as to representation in the United States Senate, is that they shall be deemed necessary by two-thirds of the Members of each House of Congress, as evidenced by their votes. As has been shown, Congress itself is not given the right to prevent the States from adopting amendments to the Constitution. Article V provides that, upon application of the legislatures of two-thirds of the States, Congress shall call a convention for proposing amendments. So, if Congress refuses to submit amendments, two-thirds of the States have the right to require it to call a convention for this purpose. The substance of the whole thing is that the States have reserved to themselves the ultimate power to amend the Constitution, and, having done this, have agreed among themselves that the propriety of an amendment, whether slight or serious, shall be determined by the judgment of three-fourths of the States. They have emphasized this in that they deal with the subject of placing restrictions and have limited them to those expressed in Article V. This precludes any implication which might be drawn from silence. The contention, therefore, that the prohibition amendment is revolutionary and invalid is clearly without merit.

It is respectfully submitted that the motion to dismiss should be sustained.

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

FEBRUARY, 1920.

○

Supreme Court of the United States,

October Term, 1919.

No. 29, Original.

STATE OF NEW JERSEY,
COMPLAINANT,
v.
A. MITCHELL PALMER, Attorney-General,
and
DANIEL C. ROPER,
Commissioner of Internal Revenue,
DEFENDANTS.

SUPPLEMENTAL BRIEF OF COMPLAINANT ON THE POWER TO AMEND UNDER ARTICLE V.

THOMAS F. McGRAN,
Attorney-General.

FRANCIS H. STICKEL,
Assistant Attorney-General.

Trenton Times Printing, 24 North Warren Street, Trenton, N. J.

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Supreme Court of the United States.

October Term, 1919.

No. 30, Original.

STATE OF NEW JERSEY, *Complainant*,

v.

A. MITCHELL PALMER, *Attorney-General*,

AND

DANIEL C. ROPER,

COMMISSIONER OF INTERNAL REVENUE,

Defendants.

Supplemental Brief of Complainant on the Power to Amend Under Article V.

The Colonies under the Government of England had law-making rights, which were stated by Edmund Burke in his classic speech, asking for conciliation with the Colonies. His fourth resolution was:

> "Each of the Colonies have within themselves a body chosen in part or in the whole by the freeman, freeholders or other free inhabitants thereof, commonly called the General Assembly or the

> General Court, with powers legally to raise, levy and assess, according to the several usages of such colonies, duties and taxes towards defraying all sorts of public services." (J. Dodsley, London, 1775, page 45.)

The distinction between the powers of the British sovereign and the legislative powers of the Colonies marks the original distinction between national government and local government. As the King of England had authority to govern in affairs of national and foreign nature, so the Colonies, by their Assemblies, had the authority to govern in their internal affairs, commonly designated as powers of economy and police.

When the Colonies became independent States, Congress exercised the national powers which had formerly attached to the British sovereign, and the various independent States retained the powers of economy and police. When the Constitution was made effective and the Union was established, the national government was exercised and has since been exercised under the powers enumerated in the Constitution, and such national powers not enumerated in the Constitution of constructive nature were still in the people of the United States, as distinguished from the people of the States by reason of the diversity of the citizenship.

Mr. Patterson, of New Jersey, who was associated with Mr. Witherspoon in the Constitutional Convention, afterwards one of the Justices of this Court, passed upon the matter of a prize taken at sea, before the Constitution became effective, and when the States were acting nationally under the Articles of Confederation. Concerning the powers of Congress at that time, in reaching his conclusions in the case, he said (*Penhalow* v. *Doane*, 3 Dall. 54, p. 80):

> "Much has been said respecting the powers of Congress * * *. To determine what their powers were we must inquire what powers they

exercised. Congress raised armies, fitted out a navy and prescribed rules for their government; Congress conducted all military operations, both by land and sea; Congress emitted bills of credit; received and sent Ambassadors; and made treaties; Congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved by the people of America."

These were the powers of the people of the United States as distinguished from the powers of the respective States because the high acts of sovereignty so exercised by Congress were, as he stated, submitted to, acquiesced in, and approved by the people.

The powers in the people of the United States as distinguished from those in the States or in the national government are very clearly stated in Tucker's Blackstone Appendix, p. 303:

"To comprehend the full scope and effect of the Tenth Article, by which certain rights are said to be reserved to the States respectively, or to the people, it is to be recollected, that there are powers, exercised by most other governments, which in the United States are withheld by the people, both from the federal government and from the state governments; for instance, a tax on exports can be laid by no constitutional authority whatever, whether of the United States, or of any State; no *bill of attainer*, or *ex post facto* law can be passed by either; no *title of nobility* can be granted by either. Many other powers of government are neither delegated to the federal government, nor prohibited to the States, either by the federal or state constitutions. These belong to that indefinite class of powers

> which are supposed necessarily to devolve upon every government, in consequence of the very act of its establishment, where no restrictions are imposed on the exercise of them * * *."

In discussing the powers of the government of the United States as distinguished from those still in the people of the United States and those reserved to the respective States, Mr. Justice Brewer in *Kansas* v. *Colorado*, 206 U. S. 46, pp. 89-90, said:

> "The proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specific things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary, they should be granted by the people in the manner that had been provided for amending that act. * * * The argument of counsel ignores the principal faction in the article, to wit 'the people.' Its principal purpose was not the distribution of power between the United States and the States,

> but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States, not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not forsee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

See, also, earlier opinion by the same distinguished Jurist to the same effect, in the case of *Turner* v. *William*, 194 U. S., p. 295.

Mr. Justice Moody in *Twining* v. *State of New Jersey*, 211 U. S. 97, further enumerated the rights and privileges of national citizenship as the right to pass freely from State to State, the right to petition Congress for the redress of grievances, the right to vote for national officers, the right to enter the public lands, the right to be protected against violence while in the lawful custody

of a United States Marshal, and the right to inform the United States authorities of violations of its laws.

The true situation was very clearly stated, as above set forth, in the same case (p. 97), where Mr. Justice Moody said, referring to Mr. Justice Miller's opinion in the Slaughter-House cases:

> "The Fourteenth Amendment * * * removed the doubt whether there could be a citizenship of the United States independent of the citizenship of the State by recognizing or creating and defining the former." ,
>
> He quoted:
>
> " 'It is quite clear then that there is a citizenship of the United States and a citizenship of the State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.' "
>
> He said, further:
>
> " The description of the privileges and immunities of state citizenship, given by Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, is then quoted (by Mr. Justice Miller), p. 76, said to include: 'Those rights which are fundamental,' to embrace 'nearly every civil right for the establishment and protection of which organized government is instituted' and 'to be the class of rights which the state governments were created to establish and secure.' This part of the Opinion (of Mr. Justice Miller) then concludes with the holding that the rights relied upon in the case are those which belong to the citizens of States as such and are under the sole care and protection of the state governments."
>
> Mr. Justice Moody continued (p. 97) to the effect that the fundamental rights of state citizens are inherent in state citizenship, that this right is a privilege or immunity of that citizenship only

and distinguished from the rights of United States citizenship by saying:

"Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States," citing *Slaughter-House Cases*, 16 Wall. 36, 79; *In re Kemmler*, 136 U. S. 436, 448; *Duncan* v. *Missouri*, 152 U. S. 377, 382.

In the succinct words of the third paragraph of the syllabus of the Twining Case:

"There is a citizenship of the United States and a citizenship of the State which are distinct from each other, *Slaughter-House Cases*, 16 Wall. 36; and privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of state, and not of National, citizenship."

In conclusion, it is clear that the right to amend the Constitution of the United States in the manner provided in Article V, by either method, is a right incident to the powers of the citizens of the United States as distinguished from the right of the citizens of the respective States; that no amendment may be made to the Constitution of the United States not of right belonging to the citizenship of the United States; that all powers not enumerated in the Constitution and not of right appertaining to the citizenship of the United States, are reserved to the respective States under Article X, which are the internal police powers of the States, and among such powers, it is settled, is the right to legislate concerning the manufacture, use and sale intra-state of intoxicating liquors; that, therefore, the sumptuary law, now

attempted to be incorporated as a fundamental law in the Constitution of the United States, is invalid because not granted by those in whom the right existed.

Respectfully submitted,

THOMAS F. McCRAN,
Attorney-General.

FRANCIS H. McGEE,
Assistant Attorney-General.

MAR 15 1926
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1919

No. 30 Original

STATE OF NEW JERSEY

Complainant

vs.

A. MITCHELL PALMER, ATTORNEY GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE

Defendants

MOTION TO FILE ORIGINAL BILL

and

ORIGINAL BILL AND EXHIBITS

STATE OF NEW JERSEY,
THOMAS F. McCRAN,
Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No..... Original.

STATE OF NEW JERSEY,
Complainant,
vs.
A. MITCHELL PALMER, ATTORNEY-GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE,
Defendants.

MOTION TO FILE ORIGINAL BILL.

Now comes the State of New Jersey, by its Attorney-General, Thomas F. McCran, and moves the Court for leave to file the bill of complaint herewith exhibited, in a suit between the State of New Jersey and citizens of other States, and arising under the Constitution and laws of the United States, for the purpose of enjoining the defendants from enforcing within the State of New Jersey, by an abuse of power, without lawful and constitutional authority or by a wrongful and erroneous interpretation thereof, such titles and sections of an act of Congress, the short title of which is the "National Prohibition Act," as apply and are designed to give effect to the so-called eighteenth Article of Amendment to the Constitution of the United States of America; and that proper process may issue thereon, notifying the defendants of the filing of said bill and that they appear and answer thereto and defend the same.

STATE OF NEW JERSEY,
By
THOMAS F. MCCRAN,
Attorney-General of the State of New Jersey.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No..... Original.

STATE OF NEW JERSEY,
Complainant,
vs.
A. MITCHELL PALMER, ATTORNEY-GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE,
Defendants.

ORIGINAL BILL IN EQUITY.

The State of New Jersey, Complainant, brings this Bill of Complaint for itself and representatively for its citizens in their sovereignty against the defendants above named, and respectfully shows unto this Honorable Court, as follows:

I. That the State of New Jersey is one of the States of the United States and that the defendant, A. Mitchell Palmer, is a citizen of the State of Pennsylvania, duly appointed and acting Attorney-General of the United States, and Daniel C. Roper is a citizen of the State of South Carolina, and the duly appointed and Acting United States Commissioner of Internal Revenue, and that both officials reside in the Capital of the United States.

II. This is a suit of a civil nature, arising under the Constitution and laws of the United States against citizens of other States of the United States, who, as designated officials of the Government of the United States, with their and each of their subordinates, agents and servants, are charged with the duty in their respective spheres of action,

of enforcing acts of Congress under the Constitution, and is for the purpose of enjoining them from acting, by an abuse of power, without lawful and constitutional authority or by a wrongful and erroneous interpretation thereof, to enforce, within the State of New Jersey, the so-called National Prohibition Act of Congress, of October 28th, 1919, or such titles and sections thereof as apply and are designed to give effect and carry out the prohibitions of the so-called Eighteenth Amendment to the Constitution in intra-state commerce, and as interfere with and limit the taxing power of the State of New Jersey; as interfere with, restrict and prohibit the collection of the internal revenues of Complainant, and as interfere with the government of its institutions and of its wards, and as limit, impair and interfere with its powers of economy and police, as well as the businesses and liberties of its citizens to its irreparable injury as hereinafter more particularly set forth, in which congressional enactment aforesaid the defendants are officially charged with the enforcement of the provisions thereof and the prohibitions therein contained. The restraint is sought because the National Prohibition Act is, or such aforesaid parts thereof are, invalid, unconstitutional and void, and the said so-called Eighteenth Amendment, though purporting to be the fundamental authority for said National Prohibition Act, is not, either in whole or in part, an amendment to the Constitution, but is wholly null and void and not enforceable in the State of New Jersey, while the State of New Jersey has not, nor have the people thereof ratified or consented to said so-called amendment, and because whether said so-called amendment and National Prohibition Act are void or not, there exists the intent on the part of said defendants wrongfully to so construe and hurtfully enforce

the "concurrent power" clause of said so-called Eighteenth Amendment, and thus, furthermore, and, in any event, to make, on such account said National Prohibition Act by such construction and enforcement unconstitutional and void.

III. The rights and interests of the State of New Jersey and its citizens are involved in the premises, and therefore this suit, under the executive direction of the Governor of the State of New Jersey, is instituted, both under the Common Law by the Attorney-General of said State and by him under the statutory authority in such case made and provided.

IV. The Complainant alleges that, as a colony, Nova Ceserea, or New Jersey, was settled largely by subjects of Sweden and of the States of the Netherlands and of the British Crown, and that said colonists as hereinafter set forth exercised and enjoyed the inherent right of self-government, in the management and control of their own affairs as a community and in the establishment of their civil institutions for the protection of the rights and liberties of the individual in so far as the same were applicable to their new conditions and circumstances.

(a) That letters patent from Charles, the Second, King of England, were granted and delivered, dated March 12th, 1664, to his brother James, the Duke of York, in which the said King gave and granted unto his said brother, his heirs and assigns, certain territory, therein described, granting therein and thereby to the said Duke of York, his deputies, agents, commissioners and assigns such power and authority, as therein described, to govern the subjects of such King, his heirs and successors, as should from time to time adventure themselves unto or that should at any time thereafter inhabit any part or

parts therein referred to, which territory the State of New Jersey, as now constituted, formed a part,—according to such laws, orders, ordinances, directions and instruments as by the said Duke should be established; so always as the said statutes, ordinances and proceedings should not be contrary to, but as near as conveniently might be, agreeable to the laws, statutes and government of the realm of England; also to make, ordain and establish all manner of orders, laws, directions, instructions, form and ceremonies of government and magistracy, fit and necessary for and concerning the government thereof, so always that the same should not be contrary to the laws and statutes of the realm of England as near as might be agreeable thereunto; and gave and granted unto the said Duke, his heirs and assigns, and also to all and every such governor or governors or other officers or ministers as by the said Duke, his heirs or assigns, should be appointed to have power and authority of government and command in and over said inhabitants of said territory for their safety and defense.

(b) That shortly after the making of said grant, the territory included therein was conquered by the military powers of the States of the United Provinces of the Netherlands, and shortly thereafter the said territory was surrendered to the King of England, and thereupon, in order to make good and affirm and establish the aforesaid grant, the said King of England, by his letters patent, bearing date on or about the twenty-ninth day of June, 1674, granted and conveyed unto the said Duke of York all the rights, powers and privileges contained in the patent first hereinbefore mentioned.

(c) That by lease dated the 23d, and release dated the 24th day of June, 1664, the said Duke of York, after re-

citing the grant previously made to him, by the aforesaid letters patent, granted, bargained, sold, released and confirmed to Lord John Berkeley and Sir George Carteret the territory of Nova Ceserea, or New Jersey, in as full and ample a manner as the same had been granted to the said Duke of York by the before recited letters patent, and all the estate, right, title, interest, benefit, advantage, claim and demand of the said James, Duke of York, of, in and to the said premises, &c., to have and to hold, &c., the said tract of land and premises, their heirs and assigns forever, &c., as by reference to the said release will more fully and at large appear.

(d) That a concession and agreement of the lords proprietors aforesaid of the Province of Nova Ceserea, or New Jersey, dated February 10th, 1664, to and with all and every the adventurers and all such as should settle or plant there was made and published on or about said time by the said John Berkeley and George Carteret, for the purpose of inducing people to settle and dwell in New Jersey, and together with subsequent declarations, was a pledge, guaranty and assurance to such settlers, relating to the power and rights of the Governor, and Council, and Secretary or Register, Surveyor General, Assemblymen and other officers and to the legislative power of the Assembly, as they should judge most conducive to the general good and welfare of the province as by reference thereto will more fully appear. These grants and concessions bear even date with the appointment and commission of Sir Philip Carteret, the first Governor of New Jersey, appointed by the said proprietors, Lord John Berkeley and Sir George Carteret.

(e) That by Quinpartite deed dated July 1st, 1676, between said George Carteret of the first part, William

Penn of the second part, Gawn Lawry of the third part, Nicholas Lucas of the fourth part and Edward Billinge of the fifth part, it was recited, inter alia, the conveyance of his (Berkeley's) moiety to or half of Nova Ceserea, or New Jersey, by said John, Lord Berkeley, by bargain and sale deed, dated March 18th, 1673, to John Fenwick, and by two other indentures, one of bargain and sale, dated February 9th, 1674, from John Fenwick and Edward Billinge (who claimed equitable interests) of the one part, and William Penn, Gawn Lawry and Nicholas Lucas of the other part, and by the second being an indenture of tripartite grant, release or confirmation, dated February 10th, 1674, between said John Fenwick, Edward Billinge of the second part and the said William Penn, Gawn Lawry and Nicholas Lucas of the third part and by several other good and sufficient assurances in the law duly executed, said moiety or half part of all said land so conveyed as aforesaid to said Fenwick was conveyed unto and vested in the said Penn, Lawry and Lucas, their heirs and assigns forever, so that the said last-mentioned held and were actually seized of the other undivided moiety or half part of all and every, the said premises of Nova Ceserea or New Jersey, as tenants in common with Sir George Carteret, who was then actually seized of the other undivided moiety or half part of all and every the same premises, who held the same to him and his heirs in common with the said William Penn, Gawn Lawry and Nicholas Lucas. And it was further recited in said deed that said Carteret, Penn, Lawry and Lucas had agreed to make a partition of New Jersey into two parts, and therein and thereby said Billinge, Penn, Lawry and Lucas granted to Sir George Carteret, his heirs and assigns forever, the easterly part of New Jersey, to have and to hold

in severalty, and Sir George Carteret, by the same indenture, granted to said Penn, Lawry and Lucas, their heirs and assigns forever, the westerly part of New Jersey, to have and to hold to them, their heirs and assigns in severalty, and the division line between East and West Jersey was therein described as by reference thereto will more fully appear.

(f) That both of said tracts of East and West Jersey were by a deed of surrender, from the proprietors of East and West Jersey, of their right or pretended right of government surrendered and yielded up for themselves and heirs to Anne, Queen of England, including all powers of government as to New Jersey granted by King Charles II to the Duke of York, and by the Duke of York to the said proprietors, as by reference to the said surrender will more fully appear, and which surrender was accepted by the Queen in Council, April 17th, 1702, and ordered to be enrolled in Her Majesty's High Court of Chancery: that thereafter on the sixteenth day of November, in said year, the said Queen issued instructions to the then Captain General or Governor of Nova Ceserea or New Jersey, to wit, Edward, Lord Cornbury, that he should call together certain persons, therein designated, who should constitute the membership of her council of said province and one general assembly to consist of twenty-four members to be chosen in the manner therein designated, by the inhabitants, householders of the city or town of Perth Amboy in East New Jersey, two by the inhabitants, householders of the city and town of Burlington in West New Jersey, ten by the Freeholders of East New Jersey, and ten by the Freeholders of West New Jersey, with power to make laws as therein enumerated for the government of the colony, which government, complainant

avers continued until the declaration of colonial rights by the American Congress of October 14th, 1774, and the establishment at Burlington of the first constitution of New Jersey, on July 2d, 1776, as hereinafter set forth in items (g) and (h) of this paragraph.

(g) That the Colony of New Jersey, when declaring a dissolution of the government of Great Britain over the colony, the more effectually to unite the people of the colony and enable them to exert their whole force in their own necessary defense against the military powers under George the Third, King of England, by advice of the Council of the American Colonies to such colonies, adopted for themselves, respectively, with other colonies, a government such as should best conduce to their own happiness and safety and the well being of America in general as was set forth in the preambles thereto, and established at Burlington in said State, July 2d, 1776, in Provincial Congress, a constitution, in and by which a government, suitable to the needs and uses of a free and independent State and people came then and there into being and which still exists under the new Constitution of the State, as originally ratified by the people at an election originally held August 13th, 1844, with subsequent amendments, wherein it is set forth and declared that government is instituted for the protection, security and benefit of the people, and that they have the right at all times to alter or reform the same, whenever the public good may require it, and wherein it is declared that all men are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying life, liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

(h) That by a declaration of Colonial Rights by the American Congress, known as the First Continental Congress, sitting in Philadelphia, adopted October 14th, 1774, at which were duly elected delegates from New Jersey, it was declared that the Colonists were entitled to life, liberty and property, and that they had never ceded to any sovereign power whatever a right to dispose of either without their consent, that our ancestors, who first settled these colonies were entitled to all rights, liberties and immunities of free and natural-born subjects within the realm of England, and further that the exercise of legislative power in the several colonies by a council appointed during pleasure by the Crown was unconstitutional, dangerous and destructive to the freedom of American legislation, all and each of which the aforesaid deputies in behalf of themselves and their constituents claimed, demanded and insisted on, as their indubitable rights and liberties, which could not be taken away from them, altered or abridged by any power whatever, without their own consent by their representatives in their several provincial legislatures, and that said First Continental Congress in an address to the inhabitants of the several Anglo-American Colonies, adopted October 21st, 1774, in reference to certain statutes of the British Parliament, stated to be oppressive, declared that their immediate tendency was to subvert the right of having a share in legislation, by rendering Assemblies useless and that the Second Continental Congress at Philadelphia, on July 6th, 1775, proclaimed that the colonists took up arms because by one statute it was declared that parliament can "of right make laws to bind us in all cases whatsoever."

(i) That by the American Revolution which took place by the Declaration of Independence, bearing date July

4th, 1776, and by its aforesaid Constitution, the State of New Jersey asserted and maintained its right to exercise complete legislative powers over its internal affairs and was and from thenceforth has been a free and independent State, and as such entitled to have and to hold all such rights as free and independent States may have and hold, to do all acts and things which independent States may of right do, and by force of said revolution and said independence the said State of New Jersey became invested with all and every power of government, property and rights of property within and appertaining to said State, which immediately before said revolution were vested in the Crown of England, and at the conclusion of said War of Independence against the Government of England, its freedom and independence as a sovereign State was acknowledged by Great Britain in the Treaty of Paris of September 3d, 1783.

(j) That the State of New Jersey by Articles of Confederation, signed July 9th, 1778, formed a league of friendship with other American States for the "security of their liberties," and under said Articles of Confederation New Jersey did not yield or surrender or delegate any legislative power over its internal affairs and civil institutions nor its powers of economy and police; and it was expressly provided by Article II of said Articles of Confederation that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in Congress assembled," and further provided by Article XIII, "Nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."

(k) That by the ratification of the Constitution of the United States by the ninth State on June 21st, 1788, the United States of America under the Articles of Confederation ceased to exist, and the United States of America under the Constitution of the United States, composed of the several States having agreed thereto, came into being and the government thereof was organized in March, 1789. That the State of New Jersey was the third State to ratify the Constitution on December 18th, 1787, but said act of ratification by the people of New Jersey was made in good faith and with full assurance that said State and the people thereof relinquished only such portion of sovereign power as was necessary and essential for the creation and establishment of a limited national government for the purposes and with the powers enumerated in the several articles of said Constitution, and that nothing might be the subject of an amendment under Article V thereof which is of a class that could, by the nature thereof tend to the destruction, either of the United States or the several States, nor that might properly be the subject of general legislation as to its internal affairs; nor did the State of New Jersey by any of the seventeen amendments thereto, afterwards surrender any of the powers, including the powers of economy and police, which were expressly reserved to the States respectively, or to the people, by the tenth article of Amendment, and that the Constitution prior to amendment was accepted and put in force in anticipation of and in reliance upon the adoption of the first amendments afterwards made thereto, as an American Bill of Rights, interpretative and declaratory of the rights of life, liberty and property of the citizens of the respective States, and which rights were always and originally comprehended within the words and meaning of the Constitu-

tion as first adopted as by the bill of rights were so interpreted and declared.

V. And Complainant is advised and therefore avers that the Constitution of the United States does not delegate to the National Government, nor to the People of the United States, any power of economy and police nor power of legislation with respect to the internal affairs and intra-state commerce of the State of New Jersey, nor is said power with respect to the internal affairs of the State of New Jersey prohibited by said constitution to the State of New Jersey, but is expressly reserved to said State, or to the people, according to the determination of the people of said State.

VI. And Complainant alleges that the Sixty-fifth Congress of the United States of America, at its second session begun and held at the Capitol on Monday, December 3d, 1917, assumed, as Complainant is advised, a power not delegated to Congress by any provision of the Constitution of the United States, and in derogation of the Constitution of the United States and of the Constitution of the State of New Jersey, and of the rights of the people thereof, and in a manner not authorized as aforesaid, purported to enact a joint resolution entitled "Joint Resolution Proposing an Amendment to the Constitution of the United States," afterwards known as and called the "Eighteenth Amendment," but without first resolving by a two-thirds vote of both Houses of Congress, as a condition precedent to the submission thereof to the several States, for the ratification thereof by the respective legislatures of three-fourths of said States, that the proposed amendment was deemed by said two-thirds of both Houses necessary and without an affirmative vote thereof by two-

thirds in number of membership of both Houses of Congress that said proposal was deemed necessary.

VII. And Complainant is advised and alleges, that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was unconstitutional, inoperative and void, on December 28th, 1917, the Secretary of State of the United States, without authority in law and under the form, guise and pretense of complying with constitutional procedure, forwarded, as Complainant is informed and believes, a certified copy of said "Joint Resolution Proposing an Amendment to the Constitution of the United States," to the Governor of each State of the United States, and that the Governor of each of said States, as Complainant is advised, thereafter submitted said proposal of amendment as an eighteenth article of amendment to the Constitution of the United States, as set forth in said Joint Resolution of Congress, as aforesaid, to their respective bicameral Houses of Senate and Assembly and therafter such bodies to the number of three-fourths thereof in the several States of the United States, assuming a power not delegated to said bodies by any provision of the Constitution of the United States, enacted resolutions of alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States as submitted by Congress, under the form, guise and pretense of complying with constitutional procedure.

VIII. And Complainant is advised and alleges that in twenty-one of said States purporting to have ratified by their respective Legislatures the said proposed amendment to the Constitution of the United States, namely, in the States of South Dakota, Oregon, Nevada, Montana, Oklahoma, Maine, Missouri, Michigan, Arkansas, Colo-

rado, Arizona, California, Ohio, Nebraska, Washington, North Dakota, Mississippi, Utah, Massachusetts, Maryland and New Mexico, the said bicameral bodies are duly restricted by provisions for an initiative and referendum vote or in the two last-named States by provisions for a referendum vote only of the people and that in fact the said referendum vote only of the people and that in fact the said States did not by their respective bicameral bodies and by vote of the people of said State ratify according to their respective Constitutions the said purported proposal of amendment called the Eighteenth Amednment, and further that three States, namely, the States of Connecticut, Rhode Island and New Jersey have not ratified the said alleged proposal in any respect or manner and therefore that three-fourths of the Legislatures, in the constitutional sense, have not ratified the same, though thereafter certified copies of the resolution of alleged ratification of the so-called Eighteenth Amendment by the aforesaid bodies, except the Legislatures of Connecticut, Rhode Island and New Jersey, were forwarded to the State Department of the United States, the certification of the alleged ratification from each State illegally and erroneously setting forth that the proposal contained in said Joint Resolution of Amendment to the Constitution of the United States had been duly adopted as an amendment to the Constitution of the United States by the Legislatures of said States, according to the provisions of the Constitution of the United States. Thereafter and under date of January 29th, 1919, the acting Secretary of State, purporting to act in compliance with the statute of the United States in such case made and provided, gave public notice, in and by a certain proclamation of said date, that said alleged amendment to the Constitution of the United

States had been duly ratified by the Legislatures of three-fourths of the several States in the United States, and had, accordingly, become valid to all intents and purposes as part of the Constitution of the United States. A copy of said notice or proclamation of the acting Secretary of State is hereunto attached, marked Exhibit I, to which reference is prayed. The said notice or proclamation embodies a full and accurate copy of the Joint Resolution of the Houses of Congress above referred to, as well as a full and accurate copy of the said alleged amendment to the Constitution of the United States, now known as the Eighteenth Article of Amendment thereto.

IX. Complainant is advised and therefore avers that said alleged Eighteenth Article of Amendment to the Constitution of the United States is wholly null and void for all and singular the following reasons, to wit:

(1) That the power purported to be exercised by Congress in enacting said Joint Resolution to submit thereby to the Legislatures of the several States the alleged Eighteenth Amendment to the Constitution, was not delegated to the Congress by the provisions of Article V of the Constitution, relating to amendments, in that it is not an amendment thereof within the true intent and meaning of that article, and the attempt to exercise such power was a proceeding unconstitutional and revolutionary, in that a written Constitution was well known and understood throughout the United States in the years 1787 to 1790, inclusive, to be an instrument prescribing, regulating and providing for the exercise of powers of government by the legislative, executive and judicial branches thereof, and not to be itself an exercise of such powers, that such was intended to be the Constitution of the United States itself, that such was the intent and meaning of

Article V in describing the instrument to be amended in accordance with the terms of that article, and that such was the intent and meaning thereof was declared and made clear by the tenth article of amendment to the Constitution, reserving to the respective States or to the people, as they themselves should determine, the powers not expressly delegated to the United States by the Constitution nor prohibited by it to the States, in order to form a more perfect union and permit, at all times, to the citizens of New Jersey, the right to alter or reform their own government whenever the public good might require it, as declared by Article One, Section Two, of the Constitution of New Jersey, wherein it is set forth that government is instituted for the protection, security and benefit of the people, which right as aforesaid to so alter or reform the prohibition of the so-called Eighteenth Amendment by the citizens of New Jersey, in the interest of local government will be forever after denied them, tending thereby to destroy the essence of the Federal system intended to be created by the Constitution of the United States and thereby tending likewise to the disruption of the United States, rather than to the maintaining of the more perfect union which the public good requires.

(2) That the special power conferred upon the Legislatures of the several States of ratification of proposals to amend the Constitution of the United States was necessarily limited by the nature and purpose of the instrument the amendment of which was authorized; that the powers so conferred were to extend to alterations or additions which were in the nature of constitutional provisions, and did not extend to the exercise of ordinary legislative powers regulating the conduct of life, morals and religion by private individuals nor of intra-state commerce, constitut-

ing government by legislation in the respective States nor to legislative powers of the Congress of the United States; and the prohibition by the alleged Eighteenth Amendment is mere legislation and not an amendment of the Constitution, but a pretense in the form and guise of an amendment to establish laws unalterable by the people by legislative act, thus wrongfully attempting to regulate and prohibit and deprive them, in their respective States and in the State of New Jersey, of liberty and property.

(3) That two-thirds of the members of both Houses of Congress did not as aforesaid in number by affirmative vote, necessary to a proposal of an article of amendment to the Constitution of the United States, deem it necessary or make such a proposal of the joint resolution purporting to propose to the Legislatures of the several States the so-called Eighteenth Amendment, nor did they, by such resolution or otherwise, declare that they deemed the same necessary, and that according to the true intent and meaning of Article V of the Constitution of the United States it is a condition precedent to any amendment that two-thirds of said members shall, in their judgment, deem an amendment necessary, and evidence their judgment by due action on their part before the Congress shall have power to propose to the several States any such amendment to said Constitution.

(4) That the said joint resolution proposing an amendment to the Constitution of the United States was not ratified by the Legislatures of three-fourths of the respective States in the sense and meaning of the use of the term "Legislatures" in the Constitution of the United States as alleged in Article VIII of this bill; and that, in any event, whatever might be the power of the people of the United States acting through conventions elected for that purpose or otherwise to include in the National Con-

stitution ordinary acts of legislation unalterable by the people of the respective and several States contrary to any grant conferred or delegation of power given in the Constitution, and expressly reserved by the tenth Article of Amendment, and in contravention of ordinary acts of legislation under the power granted to the Congress by Article I of the Constitution of the United States, such as purports to be exercised by the prohibitions and alleged authority of said so-called Eighteenth Amendment, no such power has been exercised by the people of the United States in respect of such alleged Eighteenth Amendment, but the proposal was submitted, or attempted to be submitted, in the manner provided in Article V of the Constitution in the alleged exercise of a special power conferred by that article contrary to the true intent and meaning thereof, and that in most of the States the so-called ratification was made by the Senate and House of Assembly therein, as in each State respectively denominated, some of the Houses of which, particularly as in the case of Florida, were elected by the people before the joint resolution containing the proposal was adopted by the Congress.

(5) The prohibitions contained in and the alleged powers authorized in and conferred by the so-called Eighteenth Amendment were not legislation passed by the Congress and submitted to the President of the United States, and are not, therefore, law in the legislative sense, and the purported and alleged ratification of the prohibition contained in and the alleged powers authorized and conferred by said alleged amendment were withheld from submission to the people of the several States having in their constitutions provisions for reference to them of legislative acts of their respective Legislatures before the

taking effect thereof, and such acts purporting to ratify the proposal and amend the Constitution of the United States were not legislative acts, so that the law purporting to be constitutional matter as to method and form of government, though not so, has never been passed in the exercise of legislative power as delegated to the United States in and by said Constitution.

(6) That the exercise of legislative power regulative and prohibitory of decentralized government in internal affairs of the several States under the people thereof in the guise and form of amendment to the Constitution of the United States, such as is attempted to be exercised in and by the alleged Eighteenth Amendment, thus establishing by centralization of power and authority without the consent of the State of New Jersey and its people and of other States and peoples thereof of laws unalterable and unreformable at all times by them is inconsistent with the fundamental purpose expressed in its preamble to form a more perfect union and secure the blessings of liberty to posterity, and establishes a precedent whereby no powers will be reserved to the respective States or to the people and no limitation will exist as expressed in the first ten articles of Amendment or elsewhere in said Constitution, but the powers reserved to and vested in the several States may be annulled and destroyed under the guise and pretense of amending the said Constitution.

X. And Complainant is further advised and believes and therefore alleges that although the so-called Eighteenth Amendment is not a valid amendment to the Constitution of the United States and is inoperative and void, the Sixty-sixth Congress of the United States of America at its first session illegally and erroneously assuming that a power has been delegated to Congress, by the provisions

of the so-called Eighteenth Amendment, passed on Octo ber 28th, 1919, over the veto of the President of the United States, an act entitled "An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries" with the short title of "National Prohibition Act," with the intent and purpose of enforcing the so-called Eighteenth Amendment within the State of New Jersey and the other States of the Union. A copy of the portion of said act of Congress dealing with the subject of prohibition under the alleged Eighteenth Article of Amendment to the Constitution of the United States, so far as material to the present cause of action, and being title II of said act of Congress is hereunto attached marked Exhibit II and reference thereto is prayed as fully as if herein set forth at length.

XI. And Complainant further shows and alleges that the State of New Jersey, in the exercise of its inherent and exclusive right to manage and control its internal affairs as a separate community and a free and independent State, as aforesaid, and to pursue such policy by such legislation as will provide adequate revenue by developing the resources and encouraging industries within its territorial limits and to regulate the welfare, morals and conduct of its citizens, has permitted and caused to be legally established from the beginning within the State extensive and numerous manufactories for the production of intoxicating beverages and liquors for beverage purposes, and that many millions of dollars are invested therein and in the business of retailing the products thereof, and said manu-

factories and businesses have greatly added to the value of the ratable property within the State; that there are within the State, at the present time, large quantities of intoxicating beverages and liquors that were manufactured for beverage purposes prior to the alleged ratification and taking effect of the so-called Eighteenth Amendment, and said manufactory properties, real and personal and intoxicating beverages are of great value as ratable property, amounting to many millions of dollars in money of the United States of America, and hitherto have been, and now are to some extent, a large source of revenue from taxation to Complainant; and that should the aforesaid provisions of the National Prohibition Act be enforced, and continue to be enforced, within the State of New Jersey, the extensive business of manufacturing and selling intoxicating beverages and liquors for beverage purposes within the State of New Jersey will be destroyed and is now in the process of destruction, and the value of the property especially adapted for use in said businesses will be, and has already been, greatly depreciated, and the intoxicating beverages and liquors within the meaning of said statute, of use for beverage purposes now within the State, manufactured for beverage purposes prior to the alleged ratification and taking effect of the so-called Eighteenth Amendment, will become and have practically for such purposes already become of little or no value, whereby the revenue to the State of New Jersey from all said property, based upon the valuation thereof, will be and has already to the material reduction of its necessary revenue from taxation been seriously impaired and to the detriment of the self-government of the State and the welfare of its institutions, to the great and irreparable injury of Complainant.

XII. And Complainant further shows and alleges that the State of New Jersey through its municipal subdivisions grants and has heretofore granted licenses for the sale of spirituous, vinous, malt and brewed liquors containing more than one-half of one per centum of alcohol by volume, fit for the use for beverage purposes, and that the State of New Jersey and its municipal subdivisions have for many years derived annually and now derive, or until the taking effect of the so-called Eighteenth Amendment to the Constitution of the United States, did derive, extensive revenue from the fees for said licenses, said revenue amounting in the year nineteen hundred and eighteen to the sum of two million four hundred and forty-two thousand eight hundred and ninety-nine dollars and forty-six cents ($2,442,899.46), lawful money of the United States of America, and such sum represents approximately the average revenue for other years prior thereto, which has been and is used in a large measure for the support of its said municipal subdivisions, and that should said National Prohibition Act be enforced within the State of New Jersey the said revenues to the State of New Jersey and to its municipal subdivisions will be entirely lost, to the great and irreparable injury of Complainant.

XIII. And Complainant is further advised and alleges that in and by section one of Title II of said act it is provided that "intoxicating liquor shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or in and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes," and in and by section three of Title II of

said act it is provided that "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquors," viz., within the State of New Jersey, and such acts so alleged as offenses and crimes are therein made punishable by heavy fines, imprisonments and forfeitures, as set forth in other portions of Title II of said act.

XIV. And the Complainant further shows and alleges that under an "Act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof," enacted in the year 1894, with its supplements and amendments, it has regulated and now regulates and controls the practice of medicine and conduct by physicians and surgeons in professional practice in the State of New Jersey, and that its State Board of Examiners charges and collects from applicants for licenses, fees for deposit in the State Treasury, on the issuance of such licenses, to practice medicine and surgery in the State, wherein it is provided that any person after the enactment of the statute, except as therein otherwise provided, who shall commence and continue the practice of medicine and surgery in any of its branches in said State without first having obtained and filed the license therein provided for contrary to the provisions of the act, shall be deemed guilty of a misdemeanor and punished by fine and imprisonment, or both, as therein set forth; that the license therein provided is and has been issued to successful applicants who are and have been heretofore qualified and authorized to practice all branches of medicine and surgery, and that the examination of applicants for licenses is conducted covering subjects as follows: obstetrics and gynæcology, practice of

medicine, including surgical anatomy and diseases of the eye, ear and genito-urinary organs, anatomy, physiology, chemistry, histology, pathology, bacteriology, hygiene, medical jurisprudence, and in such other subjects as the board of examiners may decide. That the National Prohibition Act by Title II thereof provides that no one shall manufacture, sell, purchase, transport or prescribe any liquor for medicinal purposes without first obtaining a permit from the defendant Commissioner when prescribed by a physician as therein provided, except in certain limited cases therein set forth, that the said permits are limited to one year and may be granted as a condition subsequent to the giving of a bond in the discretion of the defendant Commissioner in such form and amount as he may prescribe to insure compliance with the terms and provisions of the said Title, and on the refusal of a permit by the Commissioner to any applicant for such permit, the applicant may have a review of his decision before a court of equity, during the pendency of which, or until the final ruling, no prescription may be written, and that arbitrarily and unreasonably, contrary to the recognized usage of medical men in the State of New Jersey and from time immemorial, no physician is permitted by its terms to prescribe liquor, to afford relief from some ailment, of not more than a pint of spirituous liquor in ten days to be taken internally (or even in the form of stimulating enemas in emergency), nor to prescribe liquor as a preventative of disease or ailment particularly after exposure to wet and cold to relieve internal congestion resulting from exposure, for the purpose of preventing acute respiratory diseases or ailments, nor are exceptions found therein permitting prescriptions whereby licensed physicians may prescribe alcoholic liquor

in conjunction with other medicines, and, as a consequence, the prescribing of liquor with any other medicine or drug is prohibited, in using combined stimulation when essential, thus preventing the proper exercise of the license or permit issued to practicing physicians of said State; and further, that said Title and section permit and authorize the absolute refusal in the discretion of the defendant Commissioner, subject to appeal as therein provided, of licenses to those licensed and heretofore licensed to practice medicine and surgery in said State, which is contrary to the rights of the Complainants and in divers other respects offending against it, as a free and independent State and of the liberty, health, property and welfare of its people to its irreparable injury.

XV. And the Complainant further shows and alleges that it owns, conducts and controls, either directly or through and in conjunction with its municipal and county agencies in government, numerous hospitals for the insane of great size, a village for epileptics, State prisons and penitentiaries, homes for boys and for girls, homes for the feeble-minded, and for tubercular patients, and reformatories, also Soldiers' Homes and various other institutions or agencies correctional and charitable in their nature, and maintains thereat physicians resident and employed by the State of New Jersey and its municipal and county subdivisions, and that it calls in for the care and treatment, in conjunction with its resident physicians, such physicians as are conducting the general practice of medicine and surgery in the various communities of the State. That in many cases, in the practice of medicine such physicians in care of the wards, patients and those confied in involuntary servitude for crimes and offenses, treat such patients with liquor within the meaning of the National Prohibition Act,

with and without combination with other drugs, for the purpose of producing heat and energy in pathological depressive states and in lethargic-physiological activities due to advancing years as well as to conditions in which the waning life-force from general debility, senility, or any other cause requires stimulation, and especially in pneumonia and influenza cases, and in other necessities of bodily need, all of which care and treatment by its licensed and employed physicians and surgeons has been, is being and will be seriously impaired and perhaps without fault on the part of such physicians, the defendant Commissioner may deprive them entirely or temporarily of the liberty of action permitted in said State by its licensing authority and freedom of judgment in the performance of their professional duties and in the employment of said professional servants, all of which is detrimental to the public health and the health of its wards and patients, and contrary to the fundamental charter and rights of the Complainant, and welfare of the people of the State of New Jersey in the premises.

XVI. And Complainant is informed and believes, and therefore alleges, that said National Prohibition Act by Title II, in section one thereof, defines the words "intoxicating liquors" intended and required to be subject to the prohibition of the alleged Eighteenth Amendment, as meaning those liquors which contain one-half of one per centum or more of alcohol by *volume,* except such liquor as is exempted as to persons or uses, as therein noted, to which reference is hereby prayed, and Complainant further alleges that the said standard of alcoholic content so fixed by said act is not intoxicating in fact, and that a content of three and one-half per centum of alcohol in liquid by volume, and even a much larger per centum of such content of alcohol by volume, in liquid, is not intoxicating,

when used for beverage purposes, and that liquor containing but one-half of one per centum of alcohol by *volume* is substantially less than one-seventh of the amount necessary to constitute such liquor an intoxicating beverage in fact. And Complainant further alleges that the manufacture and sale of such non-intoxicating liquor, namely, spirituous, vinous, malt or brewed liquor, is authorized and lawful under the existing laws of the State of New Jersey, authorizing the licensing thereof by sale for regulation and revenue, and that numerous persons, within the definition of the said act of Congress in the State of New Jersey, citizens thereof, prior to and at the time of the alleged ratification and taking effect of the so-called Eighteenth Amendment and the enactment of said National Prohibition Act were engaged under the laws and licenses of the Complainant State in the manufacture and sale for beverage purposes of such non-intoxicating liquor containing, not to exceed, two and three-quarters per centum (2.75 p. c.) of alcohol by *weight,* which is equivalent to three and four-tenths per centum (3.4 p. c.) of acohol by *volume;* which manufacture and sale for beverage purposes are prohibited by the terms and provisions of the said National Prohibition Act, and which prohibitions and restrictions therein contained are contrary to the terms of said so-called Eighteenth Amendment and are wholly erroneous in statement of fact, as to what alcoholic content in liquid to be used for beverage purposes constitutes liquor intoxicating and is contrary to the definition and finding of fact as established by the provisions of an existing law of the State of New Jersey, of March, 1920, entitled "An act to prohibit the manufacture, sale or transportation within the State of New Jersey of intoxicating liquors for beverage purposes, de-

fining the term 'intoxicating liquors,' and providing for the the punishment of violations hereof,'' which is hereunto annexed and made a part hereof marked Exhibit III, reference to which is hereby prayed, as if recited at length. That in and by section two of said act of the State of New Jersey, intoxicating liquors are defined to be any alcoholic beverage containing more than three and one-half per centum (3.50 p. c.) by volume, and any such alcoholic beverages are in said act prohibited from manufacture, sale or transportation in said State; and said National Prohibition Act, by Title II, if enforced in the State of New Jersey, contrary to the legislative enactments of said State, is unconstitutional, arbitrary and oppressive, and deprives the Complainant of revenue from its said licenses.

XVII. And Complainant alleges that by Title II of said act of Congress the word "liquor" is defined and construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes, and said act prohibits the use of the names of beer, ale and porter in connection with the manufacture and sale of non-intoxicating malt beverages. And Complainant further alleges that the names beer, ale and porter have from time immemorial been used to designate and describe the malt beverages now familiar to the public under those names regardless of the alcoholic content or intoxicating qualities thereof; that many varieties of beer, ale and porter contain less than one-half of one per centum of alcohol by *volume*, and that the deprivation of the right heretofore existing to manufacture liquids by

their appropriate and long-established and widely-known names of beer, ale and porter in intra-state commerce, though not intoxicating in fact nor by the definition of Congress, as set forth in this bill, is unreasonable, unnecessary, arbitrary and oppressive, and contrary to and injurious to the rights and interests of the Complainant to license for revenue under its legislative enactments the manufacture or sale of non-intoxicating beverages by such names, and detrimental to the welfare of said State and its people.

XVIII. And Complainant is advised by counsel, and therefore avers, that said portion of the National Prohibition Act which by its terms is required to be enforced from and after the taking effect of the so-called Eighteenth Amendment, and by reason of its taking effect is now enforceable, and, as Complainant is informed and believes, is considered by defendants enforceable, and is intended to be enforced according to its terms by them according to the construction placed upon said act by them severally and jointly, as aforesaid, and is now being and will be so enforceable and enforced by them after the conclusion of peace between the United States of America and the Government of Germany and the allies of Germany upon proclamation of the President of the United States that peace exists when such proclamation is made, as provided by the act of Congress of August 10th, 1917, entitled "An act to provide further for the national security and defense by encouraging production, conserving the supply and controlling the distribution of food products and fuel," so that the war-time prohibition shall then cease, yet Complainant is now and will be continuously hereafter subjected to irreparable injury by the provisions of said National Prohibition Act enforceable or to be enforced,

both now and hereafter, irrespective of the restrictions of war-time prohibition.

XIX. And Complainant is further advised, and therefore avers, that the defendants above named are by law expressly charged with the duty of enforcing the terms and provisions of that portion of the National Prohibition Act hereto annexed as Exhibit II and herein complained of within the State of New Jersey, and are now engaged in carrying out and intend unlawfully and unconstitutionally, by abuse of power to attempt to carry out the provisions and enforce the prohibitions thereof without first having obtained the consent of the State of New Jersey or the people thereof, so as to deprive the State of New Jersey of that liberty in such management and self-government to which it always was and still is entitled as a free and independent State under the Constitution of the United States.

XX. And Complainant is advised and therefore avers that said portion, in this Bill excepted to, of the National Prohibition Act of October 28th, 1919, is unconstitutional and void and beyond the power of the Federal Government to enforce for all and singular the following reasons, to wit:

(A) Because said Act of Congress was enacted under and pursuant to the alleged authority purported to be conferred upon Congress in and by the alleged Eighteenth Article of Amendment to the Constitution of the United States, which is itself null and void as hereinbefore alleged.

(B) Because said Act of Congress prohibits and restricts the manufacture and sale in intra-state commerce of intoxicating liquors in the State of New Jersey from the time of the taking effect of said so-called Eighteenth Amendment.

(C) Because the State of New Jersey has not concurred in the provisions of said National Prohibition Act of October 28th, 1919, and if enforced without its concurrence or contrary thereto would violate, override and nullify the rights and powers vested in and reserved to the State of New Jersey in respect to its internal and intrastate affairs and concerns under the Constitution of the United States and the amendments thereto.

(D) Because said Act of Congress interferes with and will depreciate and in a large measure destroy the taxable value of real and personal property, manufactured and used in the manufacture and sale of liquor in the State of New Jersey and is, therefore, destructive of free and independent Government of the State of New Jersey under the people.

(E) Because said Act of Congress, by its provisions, has deprived and will permanently deprive Complainant of its revenue from licenses from the manufacture and sale of spirituous, vinous or fermented liquor, liquids and compounds containing more than one-half of one per centum of alcohol by *volume,* amounting annually to not less than $2,442,899.46, thus depriving the State directly and in its municipal subdivisions of a large part of the revenue necessary for the support of its State government.

(F) Because said Act of Congress, by its provisions, purports to and does interfere in the internal government of the people of the State of New Jersey and operates to punish them by heavy fines, imprisonments and forfeitures for violation of its provisions, thus preventing the application for licenses for sale of non-intoxicating beverages permitted under the laws of the State of New Jersey, which impairs the revenues of Complainant.

(G) Because said Act of Congress, by its provisions,

restricts the practice of physicians and surgeons of the State of New Jersey in the professional conduct in internal practice as regulated and licensed by Complainant and jeopardizes and menaces the health of its citizens and the rights and liberties of said physicians and surgeons in maintaining the public health, undertaking to severely punish them for violation of its prohibitions and provisions, and in the discretion of the defendant Commissioner to deprive any or all of them from prescribing in their professional practice intoxicating liquors.

(H) Because said Act of Congress, by its provisions, interferes, hampers, prohibits and restrains the Complainant's employed physicians and surgeons, as well as its licensed physicians and surgeons, from their proper exercises of discretion in the treatment and prescribing for and in behalf of the wards, patients and prisoners of the State of New Jersey in its own institutions and hospitals and those of its municipal subdivisions, and by its provisions makes it possible and provides that the license, in the exercise of the discretion of the defendant Commissioner, may be refused or suspended as respects said physicians and surgeons, thus unwarrantably interfering in the internal and private affairs of said State government and making the exercise of their professional duties dependent upon the will or discretion of said defendant.

(I) Because, in so far as it affects non-intoxicating liquors, said Act of Congress is not *appropriate* legislation to enforce the prohibition contained in section one of said alleged Eighteenth Article of Amendment to the Constitution of the United States, which is expressly confined and limited to intoxicating liquors, and because liquids denominated beer, ale or porter, though non-intoxicating and not containing more than one-half of one per centum of alcohol, are by its terms prohibited.

(J) Because said Act of Congress, by its provisions, in attempting to regulate and prohibit in the State of New Jersey the manufacture and sale of non-intoxicating liquors as defined by the New Jersey Legislature, and in attempting to interfere with the regulation of the health, liberty and property of the citizens of New Jersey contrary to its exclusive and inherent powers of economy and police, is not appropriate legislation.

XXII. And Complainant further shows and alleges that the so-called Eighteenth Amendment to the Constitution of the United States, by section two thereof, provides that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation," to wit, the prohibition contained in section one of said so-called article of amendment (Exhibit I.). And Complainant not in any manner waiving its unalienable sovereign right and power to govern and control its internal affairs, and especially in respect of those sought to be ruled by said so-called Eighteenth Amendment, nor in any manner conceding that said amendment is valid, and protesting that said so-called amendment is an unlawful, revolutionary and confiscatory invasion of its sovereignty, nevertheless shows: That contrary to the provisions of said section two, and without any authority, constitutional or otherwise, Congress, by enacting the said National Prohibition Act, by its provisions, prohibitions and restrictions has attempted to interfere with and encroach upon the exclusive power of the State of New Jersey to enforce said amendment intra-state, if the so-called article of amendment is valid, and the defendants have already, irrespective of the final decree of this Honorable Court, undertaken and Complainant is informed and believes

intend to enforce the said act, according to its terms, in the State of New Jersey, and have interfered and intend to interfere with the internal affairs and intra-state commerce of said State and thereby to override, encroach upon and to such extent destroy Complainant's powers of economy and police to the jeopardy of the welfare, health, happiness, liberty and property of its citizens, in violation of the powers conferred by section two of said so-called Eighteenth Article of Amendment, and Complainant further is advised and alleges, that the prohibition of the so-called Eighteenth Amendment is enforceable, if at all, if valid, within the State of New Jersey by its own State power, or concurrence, under its own laws in the enforcement thereof, as in this bill of complaint set forth and otherwise, and not contrary thereto, and particularly under the provisions of an act entitled "An act to prohibit the manufacture, sale or transportation within the State of New Jersey of intoxicating liquors for beverage purposes, defining the term 'intoxicating liquors,' and providing for the punishment of violations thereof," as aforesaid.

And Complainant further alleges that the power of the Federal Government by virtue of said so-called Amendment, if valid, is a power to enforce said so-called Amendment only so far and to the extent that the same relates to the external concerns of the United States and within the peculiar domain of the Federal Government to regulate commerce among the States, as heretofore, as distinguished from the right of the State of New Jersey, to enforce said so-called Amendment intra-state, and to regulate its internal affairs, in that said alleged Amendment confers on the State of New Jersey the right and power to legislate thereunder within its own borders.

Forasmuch, therefore, as complainant is without adequate remedy at law and its only protection in the premises must arise from the powers of this Honorable Court, in the exercise of its original jurisdiction, the State of New Jersey respectfully prays that there be granted a writ of subpœæna issuing out of this Honorable Court to be directed to the said A. Mitchell Palmer, Attorney-General of the United States, and to the said Daniel C. Roper, United States Commissioner of Internal Revenue, the defendants herein named, demanding them and requiring them and each of them to appear and answer thereto, but not under oath, answer under oath being hereby expressly waived; and that the so-called Eighteenth Amendment be declared invalid, unconstitutional, usurpatory and void; and that such portion of the National Prohibition Act as applies or relates to the enforcement of the so-called Eighteenth Amendment enacted by Congress under the assumed authority of said so-called amendment be declared unconstitutional and void, or if said so-called Eighteenth Amendment and the portions of the National Prohibition Act dependent thereon shall be found to be valid in whole or in part, or in any case, that defendants, their assistants, subordinates, agents and servants be enjoined and restrained from enforcing such portions of the said National Prohibition Act in the State of New Jersey, in such manner as to interfere with the regulation of the internal affairs of the Complainant, and that Complainant may have such other and further relief as to this Court may seem just and equitable in the premises.

STATE OF NEW JERSEY,

By

THOMAS F. McCRAN,

Attorney-General of the State of New Jersey.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

I, THOMAS F. MCCRAN, being duly sworn, depose and say that I am the Attorney-General of the State of New Jersey; that I have read the foregoing bill of complaint and know the contents thereof; that so far as the same are allegations of fact they are true of my own knowledge, and so far as they are allegations upon advice, information and belief, I believe them to be true.

THOMAS F. McCRAN.

Subscribed and sworn to in the city of Trenton and county of Mercer, at the Capitol of the State of New Jersey, in said District, this second day of March, 1920.

WM. B. MACKAY, JR.,
A Master in Chancery of New Jersey.

EXHIBIT I.

AMENDMENT TO THE CONSTITUTION, 1919.

FRANK L. POLK,

Acting Secretary of State of the United States of America.

To all to whom these presents shall come, GREETING:

KNOW YE, That the Congress of the United States at the second session, sixty-fifth Congress begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a Resolution in the words and figures following: to wit—

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE ——.

"SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

And, further, that it appears from official documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose legislatures have so ratified the said proposed amendment, constitute three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 29th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

FRANK L. POLK,
Acting Secretary of State.

EXHIBIT II.

An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

[H. R. 6810.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "National Prohibition Act."

. . . . . .

TITLE II.

PROHIBITION OF INTOXICATING BEVERAGES.

SEC. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided,* That the foregoing definition shall not extend

to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

(6) The term "bond" shall mean an obligation authorized or required by or under this Act or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner or prescribed by regulation.

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records.

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney-General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217, et seq.)

SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the

commissioner may, upon application, issue permits therefor: *Provided,* That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise

than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this Title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales.

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein pro-

vided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use

in such institution, liquor to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time

when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned,

and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture.

SEC. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

SEC. 8. The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as

and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases.

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the commissioner with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearing shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his de-

cision before a court of equity in the manner provided in section 5 hereof. During the pendency of such action such permit shall be temporarily revoked.

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided.

SEC. 11. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities.

SEC. 12. All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufac-

tured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized.

SEC. 13. It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record.

SEC. 14. It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit.

SEC. 15. It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or

for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false.

SEC. 16. It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor.

SEC. 17. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or bill-board containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however,* That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country.

SEC. 18. It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direc-

tion, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor.

SEC. 19. No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

SEC. 20. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property. Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

SEC. 21. Any room, house, building, boat, vehicle structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a

person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the

petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

SEC. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same

fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

SEC. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof.

If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said prop-

erty to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by hand-bills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

SEC. 27. In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this Act the court shall have jurisdiction upon the application of

the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect.

SEC. 28. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisonment not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two

years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

SEC. 30. No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 31. In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent, or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district.

SEC. 32. In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be im-

posed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

SEC. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

SEC. 34. All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the

record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for.

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SEC. 36. If any provision of this Act shall be held invalid it shall not be construed to invalidate other provisions of the Act.

SEC. 37. Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this Act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by volume may, on making application and giving such bond as the commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: *Provided*, That such liquid may be removed and transported, under bond and under such regulations as the commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors. Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved.

When fortified wines are made and used for the production of nonbeverage alcohol, and dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification, and such dealcoholized wines produced under the provisions of this act, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only.

In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of alcohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one-half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or proceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case.

SEC. 38. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the en-

forcement of the provisions of this Act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this Act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act: *Provided,* That the Commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required for the enforcement of this Act including personal services in the District of Columbia, and for the fiscal year ending June 30, 1920, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $2,000,000 for the use of the Commissioner of Internal Revenue and $100,000 for the use of the Department of Justice for the enforcement of the provisions of this Act, including personal services in the District of Columbia and necessary printing and binding.

SEC. 39. In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court.

TITLE III.

. . . . . .

GENERAL PROVISIONS.

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SEC. 21. Titles I and III and sections 1, 27, 37, and 38 of title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of title II shall take effect and be in force from and after the date when the eighteenth amendment of the Constitution of the United States goes into effect.

EXHIBIT III.

AN ACT to prohibit the manufacture, sale or transportation within the State of New Jersey of intoxicating liquors for beverage purposes, defining the term "intoxicating liquors," and providing for the punishment of violations hereof.

WHEREAS, On February ninth, one thousand nine hundred and twenty, upon a public hearing before the joint committee of the Senate and House of Assembly of New Jersey, evidence was produced and witnesses examined in an inquiry to ascertain the intoxicating quality of certain beverages, and it was then and there established to the satisfaction of the Legislature of the State of New Jersey that beverages containing alcohol not to exceed three and one-half per centum by volume were not in fact intoxicating.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. It shall be unlawful for any person, firm or corporation to manufacture, sell or transport within this State any

intoxicating liquors for beverage purposes, and any person, firm or corporation violating the provisions hereof shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars for the first offense, and for a second offense five hundred dollars, or by imprisonment not exceeding three months, as the court may direct, or both; *provided,* said violation or offense shall be prosecuted only after indictment by a grand jury.

2. The term "intoxicating liquors," within the meaning of this act, shall be interpreted and is hereby defined to be any alcoholic beverage containing more than three and one-half per centum of alcohol by volume.

3. This act shall not be construed and is not intended in any sense or manner whatsoever to operate impliedly as a ratification of the so-called Eighteenth Amendment to the Constitution of the United States, or in recognition of the validity thereof.

4. This act shall take effect immediately, but shall not become operative until the cessation of the present state of war, as and when proclaimed by the President of the United States.

Approved March 2, 1920.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF NEW JERSEY, COMPLAINANT, *v.* A. MITCHELL PALMER, ATTORNEY GENERAL, and Daniel C. Roper, Commissioner of Internal Revenue, defendants.	No. —, Original.

MOTION TO DISMISS.

Before answering the bill of complaint in the above-stated case come now the defendants therein and present this motion to dismiss said bill of complaint in the nature of a demurrer thereto, and pray that such bill be dismissed upon the following grounds:

First. Because the matters and things set up in said bill of complaint present no matter of a justiciable character between said complainant and these defendants, nor does it set up any subject matter properly invoking the jurisdiction of this court under the grant of judicial power to said court.

Second. Because the facts stated in said bill of complaint do not set up any cause of action.

Third. Because the said bill of complaint alleges no cause of action against these defendants or either of them.

Fourth. Because there is no equity in said bill of complaint.

Wherefore these defendants pray that said bill of complaint be dismissed and these defendants be not further required to plead thereto.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

MARCH, 1920.

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JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 30 Original.

STATE OF NEW JERSEY,
Complainant,

vs.

A. MITCHELL PALMER, Attorney General, and DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

Brief of Complainant on Motion to Dismiss.

THOMAS F. McCRAN,
Attorney General.

FRANCIS H. McGEE,
Assistant Attorney General.

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Supreme Court of the United States

OCTOBER TERM, 1919.

NO. 30 ORIGINAL.

STATE OF NEW JERSEY,
Complainant,

vs.

A. MITCHELL PALMER, Attorney-General and DANIEL C. ROPER, Commissioner of Internal Revenue,
Defendants.

BRIEF OF COMPLAINANT ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The State of New Jersey, having been granted leave to file its Bill of Complaint herein, a motion has been made, on behalf of the defendants, asking that said Bill of Complaint be dismissed, upon the allegations that the matters and things set forth therein present nothing justiciable in their nature, nor within the jurisdiction of this Court and, fur-

ther, that there is no equity in said Bill of Complaint and that the facts stated therein present no cause of action against the defendants.

The Bill of Complaint, on which this Honorable Court on this motion is asked to pass, is filed by the State of New Jersey, as one of the States of the United States and on behalf of its people, and prays that a Writ of Injunction issue against the defendants named therein for the purpose of restraining them from enforcing within its territorial jurisdiction the provisions of Title II of an act of the Sixty-sixth Congress of the United States, designated as the National Prohibition Act, which is intended to enforce the so-called Eighteenth Amendment to the Constitution of the United States.

As averred in the Bill of Complaint, these defendants, if permitted to enforce this Act of Congress within the State will override and destroy the inalienable rights of the State of New Jersey and of its people to control the internal affairs of the State, and will cause pecuniary loss to the State and affect the public health and welfare.

The complainant bases its right to relief upon the following grounds:

That acting under the provision of Article V of the Constitution and by virtue thereof, two-thirds of the Houses of Congress may not propose and three-fourths of the "Legislatures" of the several States may not ratify, without the consent of New Jersey, any change in the Constitution of the United States in the form and to the extent purported to have been done in the case of the so-called Eighteenth Amendment.

That the so-called Eighteenth Amendment was not adopted in the manner provided in Article V of the Constitution, either with respect to the action of the Houses of Congress in proposing the said Amendment or with respect to the action of three-fourths of the several states in ratifying same.

That the National Prohibition Act is void in that it was enacted under the provisions of the so-called Eighteenth Amendment. That said defendants, acting under the authority of said void Act of Congress, threaten to interfere with and are interfering with the State of New Jersey in the enforcement of its laws having for their object the regulation of the traffic in intoxicating liquor.

That if the said Eighteenth Amendment be held to be a valid Amendment to the Constitution, then, it is contended by complainant, that under Section 2 thereof the State has exclusive power, to enforce within the territorial limits of New Jersey in intrastate commerce, the provision of Section 1 of said Amendment and that it has been interfered with in the exercise of this power and of its laws by defendants' action in threatening to enforce the National Prohibition act within the State of New Jersey.

That if the Eighteenth Amendment be a valid amendment and if Congress has a right to legislate in a manner binding upon the State of New Jersey in its internal affairs, then the complainant contends that the National Prohibition Act is not appropriate legislation under said amendment.

I.

THE CONSTITUTION IN ITS RELATION TO THIS CONTROVERSY.

A.

The Nature of the Constitution.

"What is a constitution? It is the form of government denoted by the mighty hand of the people in which certain first principles of fundamental law are established. The Constitution is certain and fixed." *Van Horn vs. Dorrance*, 2 Dallas, 304, 308.

"Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent and that they cannot calculate for the possible change of things." Mr. Hamilton in the New York Convention, *Elliott's Deb.*, Vol. 2, p. 364.

"At this late date, it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the foundations of the govment, to set up its framework and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations." Mr. Justice PITNEY in *Southern Pacific Co. vs. Jensen*, 244 U. S., 205, 227.

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given

us is not to be so construed, may be admitted." *Dartmouth College vs. Woodward,* 4 Wheat., p. 629.

"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution. In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government, and to them and to the people the powers not expressly delegated to the national government are reserved. *Lane Co. vs. Oregon,* 7 Wall., 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *Slaughter House Cases,* 16 Wall., 36, 63; *Kidd vs. Pierson,* 128 U. S., 1, 21;" *Hammer vs. Dagenhart,* 247 U. S., 275, 276.

"The framers of the Constitution unquestionably had no other intent in the formation of the instrument than to incorporate therein the fundamental, permanent law for the guidance of government, rather than to make it an instrument usable for legislative purposes in the sense of formation of municipal law." *Slaughter House Cases,* 16 Wall., 63.

"The original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The

powers of the Legislature are defined and limited and that those limits may not be mistaken or forgotten, the Constitution is written." *Marbury vs. Madison*, 1 Cranch., 137.

"The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state," *Gibbons vs. Ogden*, 9 Wheat., 195."

The powers granted to the government of the United States under the Constitution are enumerated therein. It is a government of limited, delegated powers and has no powers other than those delegated and such as arise by necessary implication from such delegation.

B.

The Relation of the State of New Jersey to the Federal Government Under the Constitution.

The prerogatives and powers of New Jersey, during the colonial period, the declarations of the first and second Continental Congresses, in which conventions representatives of New Jersey participated, the adoption of her first constitution, July 2, 1776, suitable to her needs and uses as a free and independent State, and the subsequent acknowledgment of her freedom and independence by the treaty of Paris, September 3d, 1783, are detailed in the bill of complaint (Article IV).

The Articles of Confederation, signed July 9th, 1778, constituted a league of friendship among the

American states for the better security of their liberties. Under these Articles, New Jersey did not yield, surrender or delegate any legislative power over its internal affairs—economy and police or of intra-state commence,—and by Article II thereof it was expressly provided that each state retain its sovereign freedom and independence and every power, jurisdiction and right not expressly delegated to the United States in Congress assembled, and further, by Article XIII, provided: "Nor shall any *alteration* at any time hereafter be made in any of them" (*i. e.*—of the Articles), "unless such alterations be agreed to in the Congress of the United States and afterwards confirmed by the Legislatures of every state."

The Constitution became effective by the ratification of the ninth State on June 21st, 1788. The National Government, which at that time came into existence, comprised however, only nine states. The people of the State of New Jersey, as the third ratifying State, so acted in good faith and with full assurance that only such portion of sovereign power was relinquished by them as was necessary and essential to the creation and establishment of a limited national government for the purposes and with the powers enumerated in the several Articles of the Constitution, and that nothing might be the subject of an amendment under Article V thereof, except matter dealing with the structure and form of the said limited national government, and that nothing might thereafter be the subject of an amendment which by the nature thereof would tend, ultimately, to the destruction either of the said limited national government or of the several states.

II.

THE POWER TO AMEND THE CONSTITUTION UNDER ARTICLE V.

A.

Limitations Upon the Amending Power.

The framers of the Constitution never intended that the instrument should be of an immutably permanent and abiding nature. They, therefore, inserted in the Constitution, Article V, providing a method by which amendments to that instrument might be made. Such amendments should be germane to the scope of the original instrument; of a character consonant with the idea of government rather than of direct legislation. In other words, it should be of such a nature that the scope of the power, originally delegated, would be in no wise altered.

"That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention" (Art. V) "seems to be stamped with every mark of propriety. * * * It, moreover, equally enables the general and the state governments to originate the amendment of errors, as they may be pointed out by the experience on one side or the other." *Federalist 43*, pp. 338, 346.

"The term 'amendment' implies such an addition or change within the lines of the original instru-

ment as will effect an improvement or better carry out the purpose for which it was framed." *Livermore vs. Waite*, 102 Cal., 113, 118, 119.

"The power to amend, too, must not be confounded with the power to create. The difference between creating and amending a record is analagous to that between the construction and repair of a piece of personal property." *Gagnon vs. United States*, 193 U. S., p. 457.

The Fifth Article was, therefore, inserted in the Constitution for the purpose of making such necessary and needful changes as experience should demonstrate, for the carrying on of the limited national government created under the Constitution. The ordinary and natural meaning of the terms used in the Fifth Article and the purpose to be accomplished limit the authority granted by the Article to matters germane,—changes in the distribution and regulation of governmental powers. All grants of power are necessarily limited by the nature of the subject matter to which they relate. This is what confines the exercise of the judicial power to questions which are in their nature justiciable and is what confines the exercise of the taxing power to things which in the nature of our dual government are subject to taxation.

The fact that the phrase concerning the internal police of the states was omitted and that the phrase that no state should be deprived of its equal suffrage in the Senate was included is not an argument to the effect that it was intended thereby to be so read as to permit an amendment to the Constitution tending or effectuating the destruction of

the internal police powers of complainant. As Mr. Madison said at that time "to begin with these special provisos and every state will insist on them for their boundaries, exports, etc." (*Madison's Notes, Farrand*, Vol. II, pp. 629-631).

This Court has repeatedly held and it is settled that the police power is the power of state government without which the excuse for the existence of the states composing the Union would be done away with. *Texas vs. White*, 7 Wall., 700.

The Ninth and Tenth Amendments, declaratory of the Constitution itself, fixed the reserved rights of the states. The words "reserved to the respective states or the people," it is settled, refers to the police power. In this connection, reference is made to the remarks of *Mr. George T. Curtis*, in his *Constitution of the United States*, Vol. I, pp. 160-161. The Ninth and Tenth Amendments are exceptions or provisos to each Article in the Constitution no less so to the Fifth Article than to any other article. The Article in question should be considered as if those amendments had been written therein.

"We know of no rule," said Chief Justice Marshall in *Gibbons vs. Ogden*, 9 Wheat., 1, in discussing the powers granted to the general government under the Constitution, "for construing the extent of such powers, other than is given by the language of that instrument which confers them, taken in connection with the purposes for which they were conferred."

B.

The Meaning of the Word "Amendment."

Article XIII of the Confederation, as previously observed, provided that no *alteration* might be made except as confirmed by the Legislatures of every state. In the Convention which subsequently formulated the Constitution, the word "amendment" was used advisedly rather than the words "alter," "change," "diminish," "abolish," "add," "explain" or "revise," which are words that an inspection of the various constitutions then in existence show to have been in use at that time. Such words are of different or of broader meaning than the word "amendment." The word "amendment" implies a change which is closely related to the subject matter of the instrument.

In the *Passenger* cases, 7 How., 283, 453, Mr. Justice McKinley said that the acknowledged accuracy of the language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument in the confounding of such words or the employment of them indiscriminately.

It is very significant that the word *alteration* as used in the Articles of Confederation, in referring to changes in that instrument which were required by it to be made only upon the consent of all the states, was not used in the Constitution in Article V, with reference to such changes as might be permitted. It is settled that the framers of the Constitution used with great nicety words to express the exact meaning intended by them, an

the fact that the Constitution may be amended without the consent of the people themselves in convention, but may be made merely by their agents, as proposed by Congress and ratified by three-fourths of the states as was done in the present instance or by conventions in three-fourths of the states only and not by all the people, shows clearly that the use of the word "amendment" did not grant in such method to those having the power of amendment the right to make such alterations which would be equivalent to the creative power used in the original construction of the instrument, but rather that the word "amendment" has an exact limited and defined meaning.

Mr. Chief Justice Taney, in the *Passenger* cases, *supra*, p. 493, said: "Everyone will admit that a construction which suggests a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority."

Reference to the earlier dictionaries which were in existence at the time of the use of the word in Article V, clearly demonstrates that it was used in the signification of the correction of an error and the substitution of something better of the same nature. The power granted was for the purpose of preventing the defeat of the original provision in case the governmental power granted was found to be defective. Mr. Chief Justice Taney, in the same opinion said: "The members of the convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates."

In the proceedings of the Continental Congress, new matter not amendatory was referred to as a proposition under "color of amendment" and throughout the debates all new matter under the rules which was submitted and not amendatory of the proposition under discussion could not be discussed without a postponement of the matter in hand, for the reason that it was not, in fact, an amendment of the proposition under discussion, but new or creative matter under color of an amendment. *Hinds' Precedents,* Secs. 5753-5767.

The defense of Article V in the Federalist exhibits the same view of the character of an amendment. "For my part," said Mr. Hamilton "I acknowledge a thorough conviction that any amendments, which may upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers"; the *Federalist* No. 85, p. 551.

C.

The Alternative Method of Amendment Under Article V.

There are two methods prescribed in Article V for amending the Constitution. One, whenever two-thirds of both Houses shall deem it necessary Congress shall propose amendments or, upon the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes as part of the Consti-

tution, when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress.

Though there may be no objection in principle to an amendment which concerns the right of suffrage, an example of the effect of ratification by the legislatures rather than by the people in convention assembled, is suggested in that New Jersey has twice, by popular vote, refused to amend its Constitution to permit female suffrage, yet at the present session of its Legislature a proposal of an amendment to the Constitution of the United States was ratified which, by way of illustration, may be fairly indicative of what we may expect in the future.

The construction of the words of Article V, in the light of the Ninth and Tenth Amendments, indicates that the conferred power to amend by the agents of the people, viz: Congress and the Legislatures, is only such as permits of a change in the subject matter of the Constitution as is germane thereto, that no other powers than those originally granted may be incorporated among the enumerated powers as has been hereinabove set forth.

The fact that no power to make changes, other than in structural, governmental matters, is implied in the amending article under the doctrine that special powers conferred on agents limits them to matters germane to the grant. Therefore, the idea that amendments, purely legislative though national in scope, may be made by the agents of the people, rather than by the people themselves is

denied because the power was never delegated to such agents. If, however, this Court shall conclude that Article V indicates a method of alteration by way of incorporating in the fundamental law such legislative matter which restricts the people in their habits of life, heretofore exclusively a state function under the police power, it, nevertheless, is clear, it is submitted that such a revolutionary proceeding may only take place by the action of the people, assembled in convention, as in the first instance, when the Constitution was originated, though acting under the amending clause by the affirmative vote of three-fourths of the respective states. "The assent of the states, in their sovereign capacity, is implied in calling a convention and thus submitting that instrument. It required not the affirmance, and could not be negatived, by the State governments." *McCulloch vs. Md.*, 4 Wheat., 316, 404.

Both the Federal and State governments, as stated by Mr. Madison in the Federalist, are "but different agents and trustees of the people, constituted with different powers and designated for different purposes" (than are their agents in convention assembled, delegated to form a constitution).

In *Lane Co. vs. Oregon*, 7 Wall, 71, 76, Mr. Chief Justice Chase said: "Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government acting with ample power directly upon the citizens, instead of the Confederate government which acted with powers,

greatly restricted, only upon the States. But in many Articles of the Constitution, the necessary assistance of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of internal regulation is committed or left; to them and to the people all powers, not expressly delegated to the national government, are reserved."

If any part of this reserved power may be delegated by amendment of the Constitution, to the national government, it must have been the intent of the people if there was any such intent at all, that such alteration should only be made by the calling, through Congress, of conventions for ratification in three-fourths of the several states. The alternative method for ratification, incorporated in the Article, must be used in such a case if such legislative matter can possibly be incorporated in the Constitution at all.

It is elsewhere noted that the Houses of Congress were asked to make the alleged proposal to amend in the present case not because they deemed the Amendment necessary but because they should not stand in the way of ratification by the Legislatures. It will, also, be observed that the proposal in the words of the resolution was made to the "States" instead of to the respective "Legislatures" contrary to the practice heretofore followed, indicating that in the minds of the proposers the idea was more or less consciously present that in this case the subject matter was sufficiently revolutionary to require ratification by the people in their sovereign capacity, rather than by

the legislatures to whom such a power was never originally delegated and which is not now at their disposal.

"In any event, there can be no loss (by amendment) of separate and independent autonomy to the states through their union under the Constitution, but may it not be unreservedly said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states." *Texas vs. White*, 7 Wall, 725.

D.

The So-Called Eighteenth Amendment is Legislative in Nature and Revolutionary in Character, and, Therefore, Improper Under Article V.

The distinction between an amendment to a constitution and law-making power under a constitution is well recognized. The power to amend the Constitution of the United States and the manner in which that power shall be exercised is clearly set forth in Article V. The delegation of legislative power to the Congress is specifically provided for in Article I. The functions of each are separate and distinct.

The distinction between an amendment to the Constitution and the law-making power under a

constitution is well stated by the Supreme Court of Pennsylvania, passing upon the question as to whether the amendment provision in the Constitution of that state called for submission to the Governor of resolutions passed under it. The Court said: "It is, also, necessary to bear in mind the character of the work for which it provides. It is constitution making; it is a concentration of all the power of the people in establishing organic law for the commonwealth, for it is provided by the Article that 'if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall be a part of the Constitution.' It is not law-making, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its Constitution." *Commonwealth vs. Griest,* 196 Penn. St., 396, 404.

The Constitution of the United States, in Article 1, provides "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." The grant of power is exclusive. There is no other legislative power granted under the Constitution.

Legislative power is the exercise by the law-making body of the right to make rules and regulations for the conduct of persons subject thereto, in the interest of the whole nation, and necessarily implies the right of the majority to change the rules of conduct so established. It deals, generally, with the safety, health, morals, welfare and general conduct of the community as distinguished

from the form of government raised up by the people. Constitutions define the form of government, legislatures prescribe the rule of conduct for the individual. The so-called Eighteenth Amendment is legislative, not constitutional matter, and, therefore, could not be enacted under Article V, whatever might be said of the right to delegate to Congress the power to enact legislation, under Article I, which would be changeable by the will of the majority, at any time. The distinction between fundamental and legislative power is thus clear and explicit.

Mr. Jameson, in his work on Constitutional Conventions, 4th ed., sec. 85, defines the difference between fundamental laws and ordinary municipal laws, the latter said to be enactments and rules for the government of civil conduct while fundamental laws rather are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation and the apparatus of checks and balances proper to insure its integrity and continued existence.

This Court, in discussing the necessary and proper powers delegated to Congress by the Constitution, comments upon the distinction between the fundamental provisions contained in the Constitution and mere legislation, to the effect that to give to the latter the immutable character of fundamental law would be contrary to the purposes of the founders of our national government. This provision is made in a Constitution, intended to endure for ages to come, and, consequently, to be

adapted to the various crises of human affairs, should not be of such a nature as is comprehended within the character and property of a legal code. *McCulloch vs. Md.*, 4 Wheat, 415. Such is the nature of the prohibition contained in the so-called Eighteenth Amendment.

President Wilson in his work "The State," published in 1895, comments on the distinction between the fundamental law and legislation, and the practice of incorporating in state constitutions legislative matter, as well as fundamental law, and further distinguishes such practice from that followed in the construction of the Federal Constitution. He says:

> "894. *Non-constitutional Provisions in State Constitutions.* One of the most characteristic features of our state law is the threatened loss of all real distinction between constitutional and ordinary law. Constitutions are of course advertised by their name to be bodies of law by which government is *constituted*, by which, that is, government is given its organization and functions. Private law, the regulation of the relations of citizens to each other in their private capacities, does not fall within their legitimate province. This principle is fully recognized in the construction of our federal Constitution, which is strong and flexible chiefly because of its great, its admirable simplicity and its strictly *constitutional* scope. But constitution-making in the states, especially in the newer states, has proceeded upon no such idea. Not only do the constitu-

tions of the states go very much more into detail in their prescriptions touching the organization of the government; they go far beyond organic provisions and undertake the ordinary, but very different, work of legislative enactment. They commonly embody regulations, for example, with reference to the management of state property, such as canals and roads, and for the detailed administration of the state debt; they determine the amounts and sorts of property which are to be exempt from seizure for private debt; they formulate sumptuary laws, such as those forbidding the sale of intoxicating liquors; at a score of points they enter without hesitation or misgiving the field usually reserved for the action of legislative bodies."

"896. *The objections to the practice* are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together; but in proportion as constitutions make provision for interests whose aspects must change from time to time with changing circumstances they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law hitherto recognized and valued tend to be fatally obscured, but the much to be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions

> which contain the largest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must of course, however carefully drawn, prove subject to most frequent change. In some of our states, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution-making will become with us only a cumbrous mode of legislation."

"This Court so far as its function required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts." *Slaughter-House Cases,* 83 U. S., 36.

As was said in *Hammer vs. Dagenhart,* 247 U. S., 251, 274, 275, citing the *Dartmouth College* Case, 4 Wheat., 518, 629: "The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

In *South Carolina vs. United States,* 199 U. S., p. 448, it was said: "There are certain matters over which the national government has absolute control and no action of the state can interfere therewith, and there are others in which the state is supreme, and in respect to them the national government is powerless. *To preserve the even balance between these two governments and hold each in its separate*

sphere is the peculiar duty of all courts, pre-eminently of this, a duty ofttimes of great delicacy and difficulty."

The so-called Eighteenth Amendment is revolutionary in character and marks a departure from the well established distinction between constitutional and legislative matter, as well as that it interferes with the police powers of the states and the right to regulate their internal affairs. The serious consequences, which will flow from a proposal such as is contained in the so-called Eighteenth Amendment, prompts us to use the language employed by Mr. Justice Miller in the Slaughter House cases, 16 Wall., p. 78: "These consequences are so serious, so farreaching and pervading, so great a departure from the structure and spirit of our institutions, the effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of a power heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people."

III.

THE SO-CALLED EIGHTEENTH ARTICLE OF AMENDMENT WAS NOT CONSTITUTIONALLY PROPOSED.

A.

The Proposal is Subject to Judicial Review.

In supporting the argument of complainant that the amendment was not constitutionally proposed, the question arises whether the proposal as made by both Houses is subject to review as a judicial question in this Court.

It is true that in *Field vs. Clark,* 143 U. S., p. 649, this Court held that an act of Congress is complete and unimpeachable when the enrolled bill, signed by the Speaker of the Houses of Representatives and by the President of the Senate, in open session, receives the approval of the President and is deposited in the Department of State.

Mr. Justice Harlan, speaking for the Court, recited at length (pp. 673-674), the reasoning of Chief Justice Beasley in the case of *Pangborn vs. Young,* reported in 32 New Jersey Law, 29, 30, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, such a bill could not be contradicted by legislative journals or in any other mode, citing cases. That case and cases of like nature have to do with the question of the accuracy of the prescribed method having been followed.

The present situation is quite dissimilar in that it is alleged that the proposal has not been made as the Constitution directs, that it is a matter of substantive law and not a mere matter of accurate procedure.

The same Chief Justice cited authoritatively in the case of *Field vs. Clark, supra,* said in *State vs. Rogers,* 27 Vroom, 480, 616, speaking for the Supreme Court of New Jersey in a case which involved the question as to which body was a valid state senate, that in an inquiry whether the Legislature or any other body or officer has violated the regulations of the Constitution: "It is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government."

In *Bott vs. Secretary of State,* 63 N. J. Law, pp. 289, 294, etc., the Court of Errors and Appeals, in an opinion by Mr. Justice Dixon, quoted from opinions of various State Courts, including the Rogers case, to the effect that amendments, not made in accordance with rules prescribed by the fundamental law, are subject to review judicially.

The allegation in the bill presents in the first instance difficulty by reason of the fact that precedent, judicial and practical, confronts us. This Court, however, has not hesitated in certain instances to declare the correct principle upon the discovery of error in previous ajudications or in practice though long continued, when convinced that the question involved unforeseen difficulties at the time that the erroneous conclusion was orginally promulgated or practiced. One of the leading

cases is that of *Genessee Chief vs. Fitzhugh*, 12 Howard, 443, where Chief Justice TANEY said (p. 456), that the question erroneously decided in the case of *The Thomas Jefferson*, 10 Wheaton, 428, at the later time presented difficulties which could not have been foreseen at the time of the rendering of the erroneous decision, and reversed that case.

In the *Legal Tender cases*, 12 Wall., 457, this Court overruled the earlier decision in *Hepburn vs. Griswold*, 8 Wall., 603, where the Court said that in a case of far-reaching consequences rather than in cases of private right it is not unprecedented, both in this country and in England, to overrule decisions previously made.

Counsel, therefore, approaches this subject with confidence that the Court will open its mind to the presentation of that which, in the premises, appears to counsel to be worthy of the most serious reconsideration in view of the momentous ultimate difficulties which may arise and have arisen in this case by reason of what seems to complainant to be an erroneous practice and annunciation of principle on the question of the constitutional method of proposing amendments under Article V.

B.

Congress did not by two-thirds in number of both Houses affirmatively vote for the proposal of the resolution.

Article 1, Section 7, par. 3, provides that every resolution to which the concurrence of the Senate and House of Representatives may be necessary (except on the question of adjournment) shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

In the case of *Hollingsworth vs. Virginia*, 3 Dallas, 378, this Court, in 1798, held that a resolution under the Fifth Article need not be signed by the President, as every other resolution (except on the question of adjournment) is required to be signed by him, for the reason that the same vote is required to repass it over his veto as would be required in the first instance, that is, by two-thirds of both Houses, and this practice has been continuously followed since that time.

It will be observed that all resolutions, except those proposing amendments to the Constitution and those having to do with adjournments, are differentiated in class since that time.

Constitutional proposals, not being subject to the signature of the President, are, therefore, exceptions to the provisions of the third paragraph of

Section 7, Article I, namely: That such a resolution is to be passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in case of a bill, nor is such a proposal, when properly carried out in accordance with the Constitution, an act done in a legislative sense, since it is not required to be enacted as other bills are required to be.

Section V of the First Article, par. one, provides that the majority of each House shall constitute a quorum to do business. It is manifest that if all the members of each House attend and vote on the passing of a bill, that a majority is necessary for the purpose, and the deduction is warranted, therefore, that the Constitution, in providing that it shall be a majority which shall constitute a quorum to do business, provided for a quorum on that basis, the phrase "doing business" also meaning the carrying on of legislative matter conducive to the enactment of laws under such rules and regulations as may have been enacted by the body in question for the purpose.

The Constitution, by the Fifth Article, provides that whenever two-thirds of both Houses shall deem it necessary to propose amendments to the Constitution in the required alternative followed in the present instance, it is manifest that the business of both Houses is not the same business for which either House of Congress, separately organized, operates in the passage of laws. In one case "doing business" is passing legislative acts in the shape of municipal law; in the other, the perform-

ance is an act not legislative and not carried out in the form of legislation, but the making of a proposal deemed necessary to effectuate a change in the fundamental law.

The Constitution does not prescribe what constitutes a quorum of both Houses in the passage of a concurrent resolution proposing an amendment. Can it be presumed that a quorum, as provided in the Constitution for the enactment of a law, which requires only a majority of all the members to pass bills is sufficient in the case of a proposal to amend the Constitution, if voted upon affirmatively by less than two-thirds of the membership of both Houses, when there is no constitutional requirement as to the necessary number to constitute a quorum to do such high and solemn business? It is submitted that if the Constitution had provided, in Article V, that two-thirds of both Houses should constitute a quorum that it might then be reasonable to assume that a two-thirds vote of such quorum would constitute the necessary vote to make a valid constitutional proposal of this nature, but, in the absence of such constitutional limit as to a quorum, can it be assumed that the Constitution, as originally drafted, should be construed to permit action in the absence and the affirmative vote of the required number, as contained in the Article, namely, two-thirds of the membership of both Houses rather than by two-thirds of a majority necessary to do ordinary legislative business?

Complainant's contention is that the Congress, in making such proposal, acts as the agent of the people of the United States and as such the individual members of both Houses constitute their

agents in the necessary proposal, and no vote of less than two-thirds of both Houses, complete in number in the absence of a provision as to the number required to constitute a quorum, should be considered a valid action.

In the case of *Missouri Pacific Ry. vs. Kansas*, 248 U. S., 276, the Court held, in an opinion by Mr. Chief Justice White, that the vote of two-thirds of each House to pass a bill over a veto means two-thirds of a quorum of each House, which would be two-thirds of a majority of its members and not two-thirds of all the members of the body, in which decision, on p. 281, it is said that there is an identity between the provision of Article V of the Constitution as to the amending power as to the two-thirds vote in the submission of proposals and the requirements as to the two-thirds vote necessary to override a veto, making the practice of the one applicable to the other. It is submitted that as the question of the Amendment of the Constitution was not before the Court in that case, the conclusion arrived at in that instance was not necessarily consequent upon the reference by way of comparison to the amending clause to the Constitution; such a statement in the opinion was dictum and is not a precedent binding on this Court.

It is, therefore, submitted that as the full number of both Houses amounted to five hundred and twenty-nine members, and two-thirds thereof to three hundred and fifty-three members, and but three hundred and twenty-nine members voted affirmatively, it was not affirmatively resolved by two-thirds of both Houses in number, as is required

by the Constitution, and that, therefore, the alleged Article of Amendment is not a part of the Constitution of the United States and is invalid.

C.

The Proposal does not, on its face, disclose that both Houses deemed the Amendment necessary.

The first ten amendments to the Constitution were proposed by a preamble, which recited that two-thirds of both Houses deemed it necessary that the following articles be proposed to the Legislatures of the several states, etc. The resolution as originally written (see Annals of Congress, Gales Seaton's Ed. of 1834, Vol. 1, 777) did not recite that the amendments were deemed necessary. The resolution was amended by the committee to which it was referred, including the essential clause (see Annals of Congress, Gales Seaton's Ed. of 1834, Vol. 1, 780-88; 5 Hind's Precedents, Section 7029, p. 1011, note 2). The erroneous form of proposal which has been since followed appears in the Statutes at large of the United States, published subsequently to the publication above referred to (by Messrs. Little & Brown in 1845, p. 97). Subsequently, amendments to the Constitution were proposed following the erroneous form, stating merely that both Houses *concurred* in the Amendment, rather than that two-thirds of both Houses deemed it necessary.

It appears from the Congressional Record, Vol. 56, Pt. 1, p. 5644 and 434, as well as by such record

in Vol. 52, Pt. 6, p. 65, Appendix, and also by the report of the House Committee of the Sixty-fifth Congress, Second Section, 211 Pt. 1, December 14th, 1917, pp. 1-2, that members of Congress did not vote upon the proposition upon the basis of the necessity as to the National Prohibition contained in the proposal but passed it on to the legislatures of the respective states upon the theory that it was not becoming in the members of both Houses to refrain from making such proposal in view of the demand upon them. Their judgment was not exercised to the effect that Prohibition was necessary or that the proposal thereof for the purpose of bringing about Prohibition in the manner provided in the so-called Article was essential.

In the passage of a constitutional amendment by the people of a state, the ratification by the people of the proposal of the legislature in a state, is accomplished by means of the secret ballot. Each and every elector is enabled to exercise his prerogative of suffrage on the business in hand and without subjection to influence or pressure from his neighbor. Not so the members of both Houses of Congress in the proposal of a constitutional amendment or the passage of a law, and it seems that the framers of the Constitution of the United States in drafting the clause, incorporating almost irrevocable provisions in the fundamental law, realized the necessity of protecting the representatives to the extent of requiring that they should go on record as deeming the subject matter of the proposal to be necessary, and not that they

should merely acquiesce in the proposal of the article advocated, for the purpose of its submission to the Legislatures, in order that they might indicate that they individually were not avowed exponents and protectors of the "liquor traffic."

The question of the traffic in liquor is capable of legislative correction and has been in the process of such correction for years and is not itself necessarily a vital part in any sense of the fundamental law.

This Court is not asked to pass upon the policy of Congress in proposing the amendment, but is asked to declare the proposal invalid, because no discretion within the meaning of the Constitution has been exercised by those who proposed it, as appears on the face of the so-called Eighteenth Article. The provisions of the Constitution are mandatory and are subject to observance in detail according to its words in the Fifth Article, and the question as to whether that article has been complied with is clearly one for the determination of this Court for the protection in the future of the citizens of the United States and, indeed, of the respective states, for this Court will, undoubtedly, take judicial notice of the fact that it has become a simpler method to propose and ratify an amendment to the Constitution in the manner in which the so-called Eighteenth Article was submitted and purports to have been ratified, than it is and will be to gain the consent of the majority of the people to changes in the fundamental law.

When the constitutional meaning is clear, a practical construction, by legislative action, though re-

peated several times and never before challenged, cannot overthrow what is seen to be a constitutional requirement. *Fairbank vs. United States,* 181 U. S., 283, 311. Frequent violations of the Constitution do not justify this Court to give sanction to them by furthering an erroneous practice or construction. It is the highest duty, of course, not to perpetuate error. The fact that previous amendments to the Constitution have not been properly made a part of such instrument does not justify a present construction which is contrary to the intent of the founders of our Federal Government, because neither Congress nor the courts have the lawful power to so construe the fundamental article of government delegated by the power of the people themselves, when once convinced of the error. (See *Oakland Paving Company vs. Hilton,* 69 Cal., 479, 502; *Warfield vs. Vandivere,* 60 Atlantic, Md., 538.)

Such a present construction as to the method prescribed by the Constitution for a two-thirds vote of both Houses, by which an amendment to the Constitution is deemed necessary, would not operate to disturb prior amendments, where the practice in the procedure has been erroneously carried out, by reason of the fact that the people themselves have acquiesced in those particular instances. *Pease vs. Peck,* 18 Howard, 595, 597. In *Barden vs. Northern Pacific Ry.,* 154 U. S., 288, this Court said, on page 322, that those doctrines only will eventually stand which bear the strictest examination and the test of experience.

IV.

THREE-FOURTHS OF THE STATES HAVE NOT RATIFIED IN THE CONSTITUTIONAL SENSE.

The Constitution by Article V, by one method, confers upon the Congress power to propose amendments to the "Legislatures" of the several states, which, when ratified by three-fourths thereof, become parts of the Constitution.

Nineteen states have incorporated in their Constitutions the initiative and referendum feature, whereby a division of legislative power is made between the representative branches of the government and the people. Two other state constitutions contain referendum provisions only. The State of Ohio, one of the nineteen states, has in its Constitution an express provision that amendments to the Federal Constitution must be submitted to the people of that state for ratification.

In Ohio, a submission of the Eighteenth Amendment has taken place and was rejected at the polls on November 4, 1919, which rejection has been upheld by the Supreme Court of Ohio and is now pending on writ of error in this court. *Hawke vs. Smith.*

In twelve states, petitions have been presented for submission of the present proposition to the people. In the states of Washington, Nebraska and Missouri, decisions favorable to submission have been obtained.

In the states of California, Michigan, Missouri, Nebraska, New Mexico and Oklahoma, the question of submission to a referendum vote is now pending. The action of the people in petitioning for a referendum in those states thereby qualifies the people as a part of their Legislatures under their respective Constitutions.

This leads directly to the proposition that in the referendum states the people have reserved the right to make themselves a part of the "Legislatures." *Davis vs. Ohio*, 241 U. S., 565, and, having exercised this right, the amendment has not been and cannot be validly ratified until the people of a sufficient number of states have approved the amendment at the polls. The word "Legislature" means the body or bodies exercising the legislative function.

The framers of the Constitution had in mind that the word "Legislatures" as used therein might possibly comprehend law-making bodies under changed conditions, as is expressed in *South Carolina vs. U. S.*, 199 U. S., 437-448:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of power to a government its language is general and as changes come in social and political life it embraces in its grasp ***all new conditions*** which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all

> things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning."

There is no definition in the Constitution of the word "Legislature." The several states were left free to repose their legislative power in any body or set of men they might desire.

When, by Article V it was provided that constitutional amendments be ratified by the Legislatures of the several states, clearly it was intended that the ratification should be by the legislative power. In referendum States, the people have reserved to themselves the option of becoming not merely a third constituent of the Legislature, but may, if they choose, exercise a legislative authority superior to the acts of their assemblies. The division of legislative power between representative assemblies and the people is best exemplified in the Constitution of the State of Utah (see Kettleborough on "State Constitutions," p. 1355). Article 6, sec. 1 of the Constitution of Utah provides: "The legislative power of the state shall be vested,

> (1) In a Senate and House of Representatives, which shall be designated, the Legislature of the State of Utah;
>
> (2) In the people of the State of Utah, as hereinafter stated."

Where the legislative power is divisible, the consent of all the constituent parts must be obtained in order that a ratification may be valid.

In the state of Florida the constitution provides that Federal amendments cannot be ratified except by a "Legislature" elected after the proposed amendments have been submitted to the state for ratification.

That in referendum states the question of the ratification of the Eighteenth Amendment must be submitted to the people before the "Legislatures" of these states can be said to have passed on the question of ratification is sustained by a number of authorities.

State vs. Polley, 26 S. Dak., 5.

State vs. Hildebrant, 94 Oh. St., 154, affirmed 241 U. S., 565.

State vs. Howell, 181 Pac. 920 (Sup. Ct. Wash.).

State vs. Amsbury, Dist. Ct., Lancaster Co., Neb. Morning, J., Aug. 18, 1919.

Hawke vs. Smith, Supr. Ct. Oh., Sept. 30, 1919, now pending on writ of error in this Court as Docket No. 582.

Carson vs. Sullivan, Circ. Ct. Cole Co., Mo., Slate, J.

The contention that the power delegated in the Constitution originally to amend by legislatures in the sense contended for by the defendants, which purports a ratification of the so-called Eighteenth Article by the representative bicameral bodies of the respective states, is a power then delegated and now irrevocable, is answered by taking into consideration the fact that the people of the respective states might entirely by their Constitutions abolish

such bodies in the form they existed at the time the Constitution was first adopted and that, therefore, no ratification of the Constitution by the Legislatures of the respective states, in the sense contended for in the case at bar, would be possible, the consequences being that the statesmen who framed the instrument and the people who ratified it had no such thought in mind and, therefore, that Constitution does not so read.

Three-fourths of the states, therefore, have not ratified the so-called Article and, the constitutional requirements not having been complied with, it is not a part of the Constitution.

V.

PRIOR AMENDMENTS TO THE CONSTITUTION.

In an examination of the seventeen prior amendments, it is submitted that they disclose subject matter germane to the original instrument.

It is settled that the first ten amendments, as is set forth in the preamble thereto, are merely safeguards declaratory and restrictive of the express or implied declarations of the main body of the instrument. The Constitution was not changed thereby as to powers, and said amendments are regarded as contemporaneous with it, because of the conditional requirement upon the entry of some of the states, and consequently of all, that they should become a part thereof for the express purpose of safeguarding the rights and liberties of the individuals composing the several states.

The first ten amendments to the Federal Constitution contain no restrictions upon the powers of the state, but were intended to operate solely on the Federal government.

> *Barron vs. Baltimore*, 7 Peters, 243;
> *Spies vs. Illinois*, 123 U. S., p. 166;
> *Brown vs. New Jersey*, 175 U. S., p. 174.

The Eleventh Amendment was for the purpose of requiring a construction of the original instrument to the effect that the judicial power should not extend to controversies between a state and citizens

of another state, a contrary construction having been placed upon the instrument in *Chisholm vs. Georgia*, 2 Dall., 419.

The Twelfth Amendment was corrective of the method of the election of President and Vice-President of the United States.

The Thirteenth, Fourteenth and Fifteenth Amendments were the result of the Civil War and the circumstances which gave rise to it. As was said in the *Slaughter-House cases*, 83 U. S., 36, these amendments may be said to rise to the dignity of a new Magna Charta.

The Thirteenth Amendment blotted out slavery and forbade forever its restoration. This subject had been dealt with in the original Constitution, Article 1, Sec. 2, par. 3, in its reference to representation determined by the number of free persons; Article 1, Sec. 9, par. 1, which prohibited Congress from interfering with the migration or importation of such persons as any of the states should think proper to admit prior to the year 1808; Article 4, Sec. 3, which provided that no person held to service or labor in one state under the laws thereof, escaping into another, should in consequence of any law or regulation therein, be discharged from such service or labor, but should be delivered up upon demand.

Slavery at that time was contrary to the laws of England (*Somerset vs. Steward*, 20 State Trials 1, 82). In 1789 the Quakers of New York and Philadelphia, assembled in their annual meeting, drew up petitions asking the Congress to take steps toward abolishing the trade in slaves and, as an ef-

fective measure, to prohibit vessels employed in that trade from being entered and cleared at the various ports. The petitions were submitted to the House of Representatives February 11th, 1790, and on the following day another petition from the Pennsylvania Society for Promoting the Abolition of Slavery was received. The several petitions were referred to a special committee and later to the committee of the whole House. (See House Journal of Second Section of the first Congress, p. 14.)

That committee reported that under the Constitution, Congress was restrained from prohibiting the importation of slaves until 1808 and was restrained from the emancipation of slaves until that time and that the Congress had no authority to interfere in the internal regulations of particular states, in the principles of morality and religion and other matters for their comfort and well-being referred to in the report.

The committee of the whole House found and reported that the migration or importation of slaves could not be prohibited prior to 1808; that Congress had no power to interfere with their emancipation in any of the states, but that Congress had authority to restrain the African slave trade.

The report of the committee was laid on the table (see *Documentary History of the United States, Woodrow Wilson*, Vol. 5, pp. 272-274). We believe that it is unquestioned and therefore, unnecessary to quote from the debates that the failure to prohibit slavery in the Constitution originally, or to emancipate the slaves, was due to the compromise and inability at that time to formulate

a union on any other basis. The matter was, therefore, left in abeyance and the Civil War ultimately resulted as might have been expected on a compromise so contrary to the Declaration of Independence.

Mr. Lincoln in his first inaugural address, quoted from one of his own earlier speeches, saying:

> "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the states where it exists. I believe I have no lawful right to do so and I have no inclination to do so."

He called attention to the Republican platform which nominated him, which contained the following:

> "RESOLVED that the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions, according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend. * * *"

The position taken by him was the strongest possible declaration in favor of the rights of the respective states. The abolishing of slavery, as this Court has said, was by the arbitrament of war and in this manner the change in the internal affairs of the states was effectuated in accordance with the Emancipation Proclamation.

The ratification of the amendments to the Constitution, by the Southern Legislatures, the states

not being permitted to return to the Union until this had been done, is not analogous to the present situation.

The Fourteenth Amendment was held, in the *Slaughter House* cases, to remove the difficulty as to the definition of citizenship, which impaired the right of the freed man to and had reference to the limitations placed thereon in the *Dred Scott* case,, and it was to remove this difficulty and to clearly define citizenship, not only in the United States but in the state, that the first clause was incorporated, and Mr. Chief Justice Field, in *Bartemyer vs. Iowa*, 18 Wall., 129, 138, said that by the Fourteenth Amendment no one had ever pretended, as far as he knew, that that Amendment interfered in any respect with the police power of the state.

The second clause defined the rights of citizens which have at all times been enjoyed by the citizens of the several states, among whom the Negro was necessarily incorporated as a part, subsequent to the war.

The third clause was declaratory of the life, liberty and property of the individual, protected by due process of law, but this, as was stated in *U. S. vs. Cruikshank*, 92 U. S., 542, added nothing to the rights of one citizen as against the other.

The fourth clause merely provided that no person should be denied within its jurisdiction equal protection of the laws.

The Fifteenth Amendment merely invested the citizens of the United States with a new Constitutional right, that is exemption from discrimination in the exercise of the elective franchise on account

of race, color or previous condition of servitude. *U. S. vs. Cruikshank* 92 U. S., 542, citing *Miner vs. Happersett,* 21 Wall., 178.

The Sixteenth Amendment had reference to a power of taxation delegated to the Congress by the Constitution, and merely provided for a different exercise thereof.

The Seventeenth Amendment changed the method of election of United States Senators.

All of these amendments, it will be seen, are but matters germane to the original Constitution, having to do with government and not with municipal law, and were corrective of errors concluded to be existent in the original document or improvements on the original Constitution, and are entirely dissimilar, it is respectfully submitted, in nature from the present so-called Eighteenth Article.

VI.

CONCURRENT POWER.

What Concurrent Power Means.

Concurrent power under the Eighteenth Amendment is a power in the federal government to enforce the amendment only so far and to the extent that the same relates to the external concerns of the United States and within the peculiar domain of the federal government to regulate commerce among the States as heretofore, as distinguished from the right of the State of New Jersey to enforce said amendment intra-state by virtue of the power conferred on said State exclusively under said amendment (Complainant's Bill, Art. 22, pp. 35-36).

A.

A Literal Interpretation.

The Eighteenth Amendment provides:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes, is hereby prohibited.
>
> "Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

A literal interpretation of the amendment presents some novel and perplexing inquiries, which lead to startling conclusions. The amendment literally construed contemplates the United States as a whole. The prohibition contained therein is directed against the manufacture, sale, transportation within, importation into or exportation from the United States and all territory subject to its jurisdiction, of intoxicating liquors for beverage purposes.

Under Section 1, the States as sovereign entities, having separate governments, boundaries, jurisdictions and functions—in short the units—are disregarded. Under such an interpretation State governments are not recognized, State boundaries disappear, State jurisdictions are ignored. The compact mass—the aggregate—is the jurisdiction within which the amendment is to be enforced.

The enforcement of the prohibition contained in the amendment within the United States and territory subject to its jurisdiction is committed to two agencies:

1. The Congress;

2. The several States.

The division of power between the two enforcing agencies limits neither of them. Their respective powers to carry out the provisions of the amendment are operative within the territory designated in the amendment. The enforcement power is as broad as the jurisdiction. Therefore, the legislative powers of the several States, whatever they may be, or in what manner they shall be exercised, are operative *equally* throughout the United States and

the territory subject to its jurisdiction in interstate commerce as well as in foreign commerce and the right of the Congress to legislate for different localities within the state having utterly divergent conditions of life and habits, cannot be denied. Certainly such an effect was never contemplated.

The principle of decentralization is one which almost seems a part of the very nature of the race to which we belong. Cooley Const. Lim. (7th Ed., 263).

* * * * * * *

The constitutional amendment was proposed and ratified after this manner:

In the 65th Congress Senator Shepherd by joint resolution (No. 17) proposed the enforcement clause as follows:

> "The congress shall have power to enforce this article by appropriate legislation *and nothing in this article shall deprive the several states of their power to enact and enforce laws prohibiting traffic in intoxicating liquors.*"

The latter part of the clause was later eliminated so that it read when it was sent to the House from the Senate:

> "The Congress shall have power to enforce this article by appropriate legislation."

It is obvious from this reading that had it been finally passed in this latter form, there would have been given to Congress the power to enforce the prohibition in the manner in which Congress has heretofore enforced constitutional amendments where it

has been given power to do so by appropriate legislation. Had Section 2 of the amendment been left in the shape as submitted by the Senate to the House of Representatives, the contention of the defendants as made in these cases would be the correct one.

The lower House, however, amended the clause to read as it was finally passed after the Senate had concurred therein so that it now reads and is operative as follows:

> "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The result is either that the several states have the power according to the literal interpretation or have the power alleged by the complainant.

It is clear, therefore, that as proposed by Congress and as ratified by the legislatures of three-fourths of the States, there was no intention that paramount power should be given to Congress to enforce the prohibition, and also that a different construction as to concurrent power is to be placed upon the amendment than would otherwise have been the case.

It is submitted that it is the duty of this Honorable Court to place upon this amendment such a construction as will make it reasonably effective. In the words of Mr. Webster in his argument in the case of *Gibbons vs. Ogden*, 9 Wheaton, page 20:

> "A reasonable construction must be given to the Constitution; and such construction is as necessary to the just power of the States as to the authority of Congress."

B.

The True Construction of Concurrent Power in Eighteenth Amendment.

In approaching the question now under discussion, it is necessary that we constantly keep before us our peculiar dual form of government. This is clearly defined by Mr. Justice BREWER in the case of *South Carolina vs. United States*, 199 U. S., 437:

> "We have in this Republic a dual system of government, national and state, each operating within the same territory and upon the same persons; and yet working without collision because their functions are different. There are certain matters over which the national government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme and in respect to them the national government is powerless. To preserve the even balance between these two governments, and to hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftimes of great delicacy and difficulty."

In Kent's Commentaries, Vol. 1, Lecture 18, p. 388, Mr. Justice Chase is cited from the case of Calder vs. Bull, 3 Dall., 386, where he said: "that the state legislatures retained all the powers of legislation which were not expressly taken away by the Constitution of the United States and he held that no *constructive powers* could be exercised by the federal government."

In *Sturges vs. Crowninshield*, 4 Wheaton, 193, also cited by Kent in the same connection, it is stated: "That the powers of the states remained, after the Constitution, what they were before, except so far as they had been abridged by that instrument. The mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power."

"Not only, therefore, can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." *Texas vs. White*, 7 Wall., 700, 725. "In other words, the two governments, national and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers." *McCulloch vs. Maryland*, 4 Wheaton, 316.

Mr. Justice SWAIN in *Railroad Company vs. Fuller*, 84 U. S., 560, said:

> "In the complex system of polity which exists in this country the powers of government are divided into four classes:
>
> (1) Those which belong exclusively to the State;
>
> (2) Those which belong exclusively to the national government;

(3) *Those which may be exercised concurrently and independently by both;* and

(4) Those which may be exercised by the States but only until the Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall occur."

Mr. Chief Justice MARSHALL in *McCulloch vs. Maryland,* 4 Wheaton, 316, said on page 430:

"We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be from clashing sovereignty; from interfering powers; from a repugnancy in a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."

To keep each government within its sphere and to preserve the even balance of power between them has been the concern of this Court from the beginning.

The framers of the Eighteenth Amendment must be presumed to have known the constitutional history of this country and the dual form of government under which it operates as declared by this Court from time to time. With these decisions in mind, did they not for the purpose of making the Eighteenth Amendment reasonably effective, intend that in matters of local government the individual states would enforce it, in which sphere of

action they are supreme, and that in its external features the power of enforcement should be committed to the Congress, in which sphere the Congress is supreme?

An examination of the cases and a history of the legislation leading up to the enactment of the Eighteenth Amendment justifies this view.

At the time of the ratification of the Eighteenth Amendment the federal government had the power to prohibit the transportation of intoxicating liquors in interstate commerce, and the States had a similar power to prohibit intoxicating liquors within their territorial limits. The Amendment conferred no power to prohibit but took from each of these sovereign governments the power to regulate the subject mater of intoxicants for beverage purposes within their respective spheres of action. The amendment did, however, for the first time in the history of the Constitution confer in express terms a power upon the States to enforce a federal amendment, which power is described to be concurrent with that of the national government.

The federal legislation enacted under the commerce clause of the Constitution for the regulation of intoxicating liquor has invariably recognized the right of the State to control intoxicants as a matter of local self-government.

The acts of the Congress were in the nature of ancillary legislation for the purpose of more effectually aiding the States, within their respective jurisdictions, to prohibit that which under their police powers the States had the right to do.

We will not burden the Court with a long citation of cases of the futile attempts of the States to

prevent shipments from territory commonly described as wet, into states which had enacted prohibition laws. Eventually, recourse was had to the Congress and under the commerce clause of the Constitution, the Wilson Act of 1890 was enacted which provided that fermented, distilled or other intoxicating liquors transported into any state or territory should upon arrival be subject to the operation and effect of the laws of such state or territory.

The Webb-Kenyon Act of 1913 provided that the shipment or transportation of intoxicating liquors from one state into another intended to be used in violation of any law of such state or territory, should be a misdemeanor.

The Reed Act is an amendment to the Webb-Kenyon Law.

Although Congress always had the right to suppress intoxicating liquors in interstate commerce under the guise of regulation, it refrained from so doing, merely aiding the States to more effectively carry out their enactments and this, it is submitted, discloses on the part of the federal government a legislative purpose to leave the control of intoxicants to the States, it being one of the powers of local self-government.

Clark Distilling Co. vs. Western Maryland Railroad Co., 242 U. S., 311.

Thus, the power that Congress always possessed to prohibit the transportation in interstate commerce of intoxicating liquors and which it did not in the past deem wise to adopt as a general policy is now made obligatory upon it under the amendment.

From the history of the legislation it can be conclusively argued that the concurrent power clause of the Eighteenth Amendment, under which the States have an authority coequal with the federal government, confirms the policy which Congress and the prohibition States pursued for the more effective regulation of intoxicating liquors, and such policy under the Amendment is now extended to all the States of the Union.

C.

The Concurrent Power Granted in Section 2 of the Amendment Must be Construed so as Not to Work Conflict or Inconsistency.

Had Congress only been endowed with power by the amendment as in several other cases, to enforce the prohibition by appropriate legislation, the States could not have legislated in any way which would have at all conflicted with the terms of any congressional enactment.

The use of the words which extended to Congress and the several States' concurrent power precludes the construction that has heretofore been placed upon the power of Congress with respect to that of the States since the word "concurrent" has not heretofore been used in the Constitution. The use of the term in the Constitution is new and it is submitted that the construction placed upon "concurrent jurisdiction" by the courts in the case of boundary jurisdiction between the States is not applicable to the present situation any more than

the ruling of the courts of England with respect to tidal streams as navigable waters is applicable to the tidal streams in this country. The courts of the United States have found it necessary to define differently the navigability of the streams with respect to tidal waters, because of the different situation existing in the United States than from that of England, in which country streams that are not tidal are not navigable. So where the operation of the powers of the national government are distinguished from those of the respective states, it is our insistment that this Court will find it necessary to place a construction upon the words "concurrent power" which will be appropriate to the enforcement of the amendment giving due respect to the rights of the State governments and the rights of Congress.

Mr. WEBSTER, in the argument in Gibbons vs. Ogden (9 Wheat., p. 12), said:

> "What sort of *concurrent* powers were these, which could not exist together? * * * The Constitution was framed for all the States." * * * "It is the true wisdom of these governments to keep their actions as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground which the public good, as well as the Constitution, refers to the exclusive control of Congress."

Mr. Justice McLEAN, in the License cases (5 How., 504, p. 592), said:

> "That the police power of a state and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent and are essential to both governments."
>
> "This power (internal police) can neither be abdicated or bargained away (by the States) and is inalienable even by express grant."

Mr. Justice PITNEY, *Atlantic Coast Line R. R. Company vs. Goldsborough*, 232 U. S., 548, p. 558;
Denver & Rio Grande R. R. Co. vs. Denver, 250 U. S., 241, p. 244.

It is necessary to so construe "concurrent power" to enforce the prohibition that a true concurrence may take place in power and effect. Such a concurrence may be illustrated by two individuals making separate journeys by separate routes to the same place of destination, or it may be further illustrated by the use in war of an army and a navy the objective being a victory, the power used being concurrent but distinct, neither encroaching upon the other and neither necessarily requiring the withdrawal of the one or the other because of conflict.

The defendants, if our understanding of their contention is correct, hold to the view that there is no real concurrent power, but that Congress is

supreme, and that the States may exercise jurisdiction in the premises by necessary uniformity in legislation with that of Congress, which, we contend, is a mere dependence.

In the Passenger Cases, it is said, 7 Howard, 282, at p. 399:

> "That a concurrent power excludes the idea of a dependent power."

It is submitted that this was stated in considering the constitution when it contained no such grant of power in words as in the present instance, and had to do with the subject of the right of the States to legislate on a matter with which Congress was endowed with power under the Constitution;

and at page 396:

> "A concurrent power in the States to regulate commerce is an anomaly not found in the constitution. If such power exist it may be exercised independently of the federal authority."

Such power, that is concurrent power, now exists if the present article of amendment is determined by this Court to be valid. The question is how may such an anomaly not heretofore found in the constitution be exercised in the manner indicated in the Eighteenth Amendment? In the words of Mr. Justice McLEAN:

> "The State power may be exercised independently of the federal authority if such power exist."

The power exists by reason of the fact that the States are to have "concurrent power" with Congress. How then may Congress and the States act independently and yet exercise the concurrent power conferred? *It is submitted that it may only be accomplished by each power acting in its sovereign and exclusive sphere*, namely, the Congress in interstate commerce, in the territories, in the District of Columbia, and in foreign affairs on the one hand and the respective States in the exercise of their police powers on the other.

In this way only may a real concurrence of power be exercised and harmoniously carried out.

To extend to the States a power concurrent with Congress in its exclusive sphere, it is submitted, would be to extend to the States a power not intended by those who framed and those who concurred in the amendment. And, conversely, it is equally true that it was never intended by the same reasoning to extend to Congress a power to operate in those things which concern alone the decentralized governments of the respective States according to the peculiar needs of the people of the locality in which sphere the States are supreme.

It is our insistment that if the defendants' contention be correct and the Eighteenth Amendment authorizes Congress to enforce the same within the State of New Jersey, it follows as a matter of course that it has also authorized the State of New Jersey to enforce the Amendment wherever foreign commerce or commerce between the States, in intoxicating liquors, directly touches the State of New Jersey. The result of such a construction would be to make a sweeping radical change

in the whole theory which has been evolved from the Constitution of the United States in regard to the exclusive control of Congress over a wide field of commerce.

It was said in *re Rahrer,* 140 U. S., 545, at 554:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity is the power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive."

In the *Civil Rights Cases,* 109 U. S., 313, Mr. Justice BRADLEY said:

> "That legislation under that Amendment cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights of man and man in society. It would be to make Congress take the place of the State legislatures and to supercede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the Amendment sought to be protected against invasion on the part of the State without due process of law. Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to

> any persons, of the equal protection of the laws, is prohibited by the Amendment, therefore Congress may establish laws for their equal protection."

In *Barbiere vs. Connelly,* 113 U. S., 27, 31, Mr. Justice FIELD said:

> "It is not to be doubted that the power to make the ordinary regulations of police remain with the individual states and cannot be assumed by the national government."

This power to prohibit, therefore, in view of these well-settled principles in our constitutional law should be construed just in the sense in which they have been understood in the Constitution. The power to prohibit, which the national government possessed, was part of its power under the commerce clause of the Constitution. The remainder of the power to prohibit was vested in the States. The power which is vested in the States is to be construed in connection with the Tenth Amendment to the Constitution, which expressly reserves to the States all powers not conferred on the federal government.

In principle this case is not essentially different from the claims made under the Fourteenth Amendment in the *Slaughter-House Cases,* 83 U. S., 36, page 78. Against the contention that that Amendment had conferred powers which were essentially State powers upon the Federal government, Mr. Justice MILLER said, as we have before quoted:

> "These consequences are so serious, so far-reaching and pervading, so great a departure

> from the structure and spirit of our institutions; when the effect is to *fetter and degrade the state governments* by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments, to each other and of both those governments to the people, the argument has a force irresistible *in the absence of language* which expresses such purpose too clearly to admit of doubt."

Mr. Justice McLane in the *Passenger Cases,* 48 U. S., 383, at page 399, *in discussing the impossibility of a real concurrent power existing in two distinct sovereignties* to regulate the same thing and in a situation where there existed only such concurrent power as has been heretofore defined to mean the supremacy of Congress in place of conflict, said:

> "That the action of one, unless there be an arrangement" (that is as to uniformity of legislation) "must necessarily precede the action of the other, and that which is first, being competent, must establish the rule."

He contended that:

> "Such was an unequal power unless one might undo what the other does, and that this must be the result of their action."

He continued by saying:

> "But the argument is that a State, acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject, and that the State must then yield to the paramount authority * * *."

He added, however:

> "But this argument degrades the States by making their legislation, to the extent stated, subject to the will of Congress. State powers do not rest upon this basis. * * *
>
> "State powers are at all times and under all circumstances exercised independently of the general government and are never declared void or inoperative except when they transcend state jurisdiction."

The reasoning in *Prigg vs. Penn.*, 16 Pet., 539, leads to the same logical result—the right to have fugitive slaves returned was created by the Federal Constitution. Therefore, being a right created by the Constitution, it must, according to the majority opinion in that case, be enforced by the national authority exclusively and not by the States. In other words, a national right must be under the jurisdiction of the national government. If the right to have the slaves returned had been a right vested in the States before the adoption of the Constitution, the plain inference is that the States then would have had the power.

In construing, therefore, this power to prohibit, we must separate it into its parts, assigning the

parts which are national to the national government and the remaining parts to the States. This construction would interpret the second section, declaratory of what the constitutional rule in this case would be in giving force to the concurrent power clause, such an interpretation as to fully maintain the proper balance of power, avoiding what would otherwise be an inevitable conflict of sovereignty, and, we submit, it expounds the true intent of the amendment.

This Amendment affects the commerce clause in the Constitution and it must be construed to restrict the will of Congress to permit interstate shipments of intoxicating liquors, for beverage purposes, into the States. We give full effect to this perplexing question under the well-settled rules of construction.

The whole theory of the relations between national and state governments would be thrown out of joint if the power of the States was in anywise impaired by this Eighteenth Amendment. Would it not, as Mr. Justice MILLER said in the Slaughter-House Cases, above quoted, "constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens under this Amendment, with authority to nullify such as it did not approve as consistent with those rights as existed at the time of the adoption of this Amendment? * * * " As he further said (p. 82): "Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the assistance of the States, with power for domestic local government, including

the regulation of their civil rights, was essential to the perfect working of our complex form of government. * * * Though they have thought proper to impose additional limitations upon the States and to confer additional power on that of the nation, whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject, so long as it shall have duties to perform which demand of it a construction of the Constitution or any of its parts."

The defendants have contended before the bar of this Court in earlier cases, and probably will so contend in this case, that the expression "concurrent jurisdiction" as defined heretofore in this court refers to separate distinct and independent action by the States and by Congress respectively, exercised by the two governments, as stated in the case of *Fox vs. State of Ohio*, 5 How., 410, 418, to the effect that the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy in any branch of administration. In the same connection it was there said there were three cases of alienation of State sovereignty, namely:

> "Where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority

> to the Union and in another prohibited the states from exercising the like authority; and where it granted authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

It will be observed as the words "concurrent power" were defined in that opinion and as contended for by the defendants, there were no express words in the Constitution granting such a power but that always under the Constitution, in case of any conflict whatever, the Constitution was supreme in authority and that, therefore, Congress had paramount power in the premises to enforce as distinguished from any other power.

The dissenting opinion by Mr. Justice STORY, in *Houston vs. Moore*, 5 Wheat., 47, has the same thought in view to the effect that the powers

> "So granted are never exclusive of similar powers existing in the States, except where the Constitution has expressly in terms given an exclusive power to Congress or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States."

The defendants will contend that the power of Congress is not of such a nature as would be necessarily exclusive but is to be exercised by Congress with the States retaining their right to exercise it at the same time, subject only to the qualification that in the case of a direct conflict between State and Federal laws the latter must prevail.

All the definitions heretofore made of concurrent power are such as define an entirely different exercise of power than is now granted in the amendment. The amendment, if upheld by this Court, grants a power from the people of the United States to the States of the Union and to Congress. The source is the same as it flows to both agencies of government, the national government and the governments of the respective states. By its words, it gives to all exactly the same authority to carry into effect and enforce by prohibition the manufacture, sale or transportation of intoxicating liquors for beverage purposes within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, and concurrent power is granted to all to enforce the same by appropriate legislation. This grant by the legislatures of the respective States, in ratifying the proposal, is an entirely different grant than those heretofore enumerated in the Constitution. It entirely removes from the reading of this Amendment the application of the clause in the Constitution as to the supremacy of the enactment of Congress which would displace or run counter to an enactment of any one or all of the States. The States must retain their powers of economy and police in order to maintain their sovereignty, and the words "concurrent power" must be, it is submitted, defined in a sense exclusive to the States and exclusive to the United States in accordance with the needs of each State and the United States, otherwise the use of the word "appropriate" in

connection with the word "concurrent" cannot properly be made. While appropriate legislation has been defined to be such as may be necessary and proper, in this case, it is submitted, the word "proper" has the sense of peculiar or exclusive, and as applied to the express grant of power equally to the Congress and the several States it must be such that there may be no conflict because the idea of concurrence immediately ceases when it is necessary for the one governmental body to withdraw in favor of the other.

In the *Passenger Cases* we find, by again referring thereto, 7 How., on p. 399, it was said:

> "Concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. Joint action is not supposed, and two independent wills cannot do the same thing."

And we add that it is also clear that forty-nine independent wills cannot do the same thing and that if they must concur by joint or uniform legislation, Congress would have supreme power and not concurrent power, which would be a construction, we submit, authorizing legislation not appropriate in the premises.

Under the construction contended for by the plaintiff, with each sovereign acting within its supreme sphere, it will make effective the prohibition contained in the Eighteenth Amendment, without conflict between the federal government and the

sovereign states, without conflict in their operations and without disturbing that dual form of government which is the genius and character of our Nation.

VII.

THE NATIONAL PROHIBITION ACT IS NOT APPROPRIATE LEGISLATION.

As alleged in the bill of complaint in this action the defendants herein are threatening to enforce within the State of New Jersey the National Prohibition Act, having for its purpose, by title II thereof, the enforcement of the so-called Eighteenth Amendment.

The part of the so-called Eighteenth Amendment, pertinent to this discussion, reads as follows:

> Sec. 1. "After one year from the ratification of this Article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories, subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.
>
> Sec. 2. "The Congress and the several states shall have concurrent power to enforce this Article by appropriate Legislation."

The subject matter prohibited by the said amendment is INTOXICATING LIQUOR FOR BEVERAGE PURPOSES. Section 1 speaks for itself. It is a plain

prohibition, providing for the suppression of intoxicating liquor for beverage purposes. Section 2 is merely a grant of power to enforce the provisions of Section 1. The mere statement of the phrase "beverage purposes" implies its meaning. The phrase "intoxicating liquor" has a well defined meaning in the law. The last-mentioned phrase is defined in Black's Law Dictionary, as follows:

> "Any liquor used as a beverage and which when so used in sufficient quantities ordinarily or commonly produces entire or partial intoxication."
>
> "Any liquor intended for use as a beverage or capable of being so used which contains alcohol either obtained by fermentation or by the additional process of distillation, in such proportion that it will produce intoxication when imbibed in such quantities as may practically be drunk."

The enforcing agency is here limited to carrying out the provisions of a specific prohibition. Any enforcing act should, therefore, be tested out by inquiring whether the subject matter is consonant with the definition of the subject matter contained in the prohibitory amendment itself.

An examination of the text of Title II of said Act (Exhibit II, p. 41, Bill of Complaint) shows that Congress has by said Act framed a definition of the phrase "Intoxicating Liquor," which definition, as complainant shows, includes liquor containing an alcoholic content so fixed as not to be intoxicating in fact; that regardless of their intoxicating or non-intoxicating qualities, said Act pur-

ports to prohibit and to illegally regulate by name the use of liquids denominated "beer," "ale," and "porter"; that said Act illegally attempts to regulate the manufacture, sale, possession and use of liquor for medicinal purposes; that said Act illegally limits the amount of liquor that may be, for medicinal purposes, used internally during a definite period of time, and illegally attempts to prohibit the use of liquor for medicinal purposes for any but a known ailment; prohibits its use in conjunction with other medicines and, further, illegally attempts to regulate the manufacture, sale, possession and use of liquor intended to be used for non-beverage purposes.

In short the said Act purports to regulate and prohibit things not within the prohibition of the Constitution. It is submitted that there is nothing in either section of the Amendment directly permitting this to be done. Neither is there any merit in the possible claim that, as a means of making the provisions of the Amendment effective, Congress may prohibit and regulate, by definition, or otherwise, liquids not in fact intoxicating or not in fact used for beverage purposes.

In framing its enforcement legislation Congress has not that degree of liberty of action with which its war powers may be exercised nor that degree of freedom from restraint with which the several States may exercise their police power.

Purity Extract Co. vs. Lynch, 226 U. S., 192.

The power of Congress in this instance is to enforce a prohibition expressly limited in its

scope and to permit it, under an authorization to enforce, to enlarge the scope of the prohibition by suppressing and regulating things not comprehended in the Amendment, is in effect, to thwart the will of the people as expressed in their Constitution and further to interfere with rights to an extent beyond that necessary to remedy the mischief aimed at in amending the Constitution.

Slaughterhouse Cases, 16 Wall., 36;
Civil Rights Cases, 109 U. S., 1;
The Employers' Lialibity Cases, 207 U. S., 463.

In this connection it is pertinent to quote from the well reasoned opinion (not yet reported) of Judge GEIGER in the United States District Court for the Eastern District of Wisconsin, in the case of *Manitowoc Products Company vs. Hiram A. Sawyer, et al.*, a case in which this particular part of the Act of Congress was attacked on substantially the same grounds as here.

"These suggestions all lead us back to the fundamental and elementary principle that in enforcing a prohibition, the end of the enforcing act, therefore *its* subject matter, must come within the confines of the constitutional subject matter. If this is not true, then, as suggested, what is the limit to an enforcing power when once exercisable in respect of *definition for enforcing purposes;* when the legislature may say with scarce a limitation on its right, that it may define as culpable that which, un-

der the constitutional provision, is left inculpable. We are not here dealing with a legislative provision seeking to prescribe a rule of evidence which, when presented shall furnish a *presumptive* or *prima facie* basis for inferring culpability. We are dealing with a provision of a legislative act aimed to enforce a constitutional prohibition against intoxicating liquor, but which, being enforced, *denies to the individual, conclusively, opportunity to assert that he is outside of the range of constitutional interdiction.* The plaintiffs' product —in point of fact containing five times the alcoholic content prescribed by the enforcing act —is, in this case, conceded not to be intoxicating liquors; and were the case before us upon indictment, the result would be a conviction and an establishment of guilt under the enforcing act, notwithstanding the full concession that nothing has been done to establish *constitutional culpability.* Obviously, though without desiring to pass upon it as a question in issue, if one-half of one per cent. were prescribed by the enforcing act as a *presumptive* basis, or a *prima facie* showing of the intoxicating quality of the product, we should have before us a markedly different case; for then the *constitutional fact* would not only have to be established, but the party accused would have *full opportunity to negative culpability.* It may be conceded that the presence of alcohol is a chief characteristic of intoxicating liquors. But the very concession in the pres-

ent case demonstrates that the fact—the *intoxicating quality* of the prohibited thing, which *by the constitution* is placed within *the field of disputation*, may depend wholly upon the matter of the *degree* of alcoholic content.

"Therefore, the constitutional terms themselves measure the field of, and place within it, the fact or facts open to, disputation. To permit legislative power to enter this field, enlarge or restrict it, prescribe the range of disputation by giving an element of fact the conclusive, indisputable force of establishing *culpability*, simply destroys the amendment, or, *in the present case, transforms it into a general grant of power, not to enforce the subject of prohibition of 'intoxicating liquors for beverage purposes,' but to legislate upon the broad subject of beverages;* and the particular enforcing act, and any other act which may be framed under the power of definition forbids and punishes and will forbid—*or permit*, if in legislative discretion that is proper—*percentages;* and will foreclose inquiring into the *fact* which the constitution declares is the *condition* of prohibition, just as effective as (see Bailey vs. Alabama, 219 U. S., 219) *breach* of a contract was attempted to be made *conclusive* evidence of *fraudulent* breach, under a statute aiming to punish the latter.

"In this connection, cases cited and the view expressed, that, by including non-intoxicants in a definition of intoxicants, the legislature does not thereby presume to make intoxicants

out of non-intoxicants, are not at all pertinent. Probably all will concede at least that limitation on legislative power. The controversy arises when the legislation charged solely with the enforcement of a limited prohibition directs its efforts to matters outside of the limitation, interdicts them conclusively as of the same grade of culpability and subject to the same penalties as the constitutionally prohibited thing; when it punishes as intoxicating that which is not so, and which, upon the law before us, the *national sovereignty has left free to be done by not prohibiting it*.

"Every consideration of the matter requires a negative answer to the question propounded by the plaintiff in this case; that the act in question, insofar as it defines or it attempts to define, intoxicating liquors, by including therein non-intoxicants, cannot be sustained."

VIII.

THE COURT HAS JURISDICTION OF THIS CONTROVERSY.

A.

The State of New Jersey is a Real Party in Interest.

The State of New Jersey, in compliance with its duty to protect the health of its people has licensed persons to engage in the practice of medicine and surgery within its borders. The persons so licensed are, in effect, its agents in the preserving of the public health. The bill of complaint in this cause alleges that alcoholic liquor, used either alone or in conjunction with other medicines, is in common use by physicians and surgeons in the State of New Jersey in the prevention and cure of diseases and other ailments; that these defendants threaten to enforce within said State the provisions of Title II of the Act of Congress known as the National Prohibition Act, which act in a drastic manner regulates the use by physicians and surgeons of alcoholic liquor in the prevention and cure of diseases and other ailments and consequently, it is respectfully asserted, the health of the people of said State is jeopardized.

As alleged in the bill in this cause, the State of New Jersey, for the common benefit of all of its people, maintains, either directly or through its municipal agencies, numerous hospitals for the in-

sane, the feeble minded, the epileptic, the aged and infirm, persons afflicted with tuberculosis, Homes for soldiers and various other institutions; that in its conduct of these institutions the State employs physicians; that the use of alcoholic liquors for the prevention and cure of diseases and other ailments by these physicians is also drastically interfered with by the Act which defendants threaten to enforce.

It is asserted, therefore, that the State of New Jersey occupies the position of *parens patriae,* guardian, trustee and representative for (a) the people of the State and (b) its dependents and wards so resident in its numerous institutions.

In Heckman vs. United States, 224 U. S., 413, it was held that the United States had capacity to maintain a suit to set aside conveyances made by allottee Indians of allotted lands. The theory upon which the United States was held capable of maintaining the action in this case was the recognition by the Court of the dependent status of the Indians and the duty of the United States in the premises.

In United States vs. New Orleans Ry. Co., 248 U. S., 507, the Court, in sustaining the right of the United States to institute the action, said: "There is an obligation for those for whose benefit the suit is brought."

Missouri vs. Illinois &c., 180 U. S., 208;
Kansas vs. Colorado, 185 U. S., 125; 206 U. S., 46;
Georgia vs. Tenn. Copper Co., 206 U. S., 230.

If the so-called Eighteenth Amendment to the Constitution of the United States is a valid amendment, then, it is respectfully asserted that by Section Two of said amendment the duty is placed on the State of New Jersey (exercising power concurrently with Congress) to enforce the provisions of Section One of said amendment, and it is therefore, by virtue of this duty, the right of the State of New Jersey to ask this Court to restrain these defendants from interfering with its proper exercise of the power so given to enforce the said amendment.

In re Debs., 158 U. S., 564, the question arose concerning the jurisdiction of a court of equity at the suit of the Government to enjoin interference with the transporation of the mails, the Court, while adverting to the fact that the United States had a property in the mails, declined to place its decision upon that ground alone, and rested it also upon governmental duty. The Court said (pp. 584, 586):

> "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. • • • The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, there-

fore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from highways under its control."

In *Kansas vs. Colorado,* 206 U. S., 86, the United States rested its petition for intervention upon its duty of legislating for the reclamation of arid lands. This duty was regarded as sufficient cause for permitting its intervention in the controversy.

See also:

United States vs. San Jacinto Tin Co., 125 U. S., 273.

United States vs. Bell Tel. Co., 128 U. S., 315.

Contrary to the provisions of the tenth amendment of the Constitution, these defendants are threatening to interfere with the reserved powers of the State of New Jersey, as alleged in the bill of complaint, and the State is, therefore, justified in maintaining this suit not only to protect its rights as a sovereign State but likewise for the people of the State.

The State further claims the right to institute this suit to prevent irreparable damage in the way of loss of ratable property, taxes and license fees, which it will sustain should the defendants be permitted to enforce within its borders the unconstitutional act in question.

B.

This Action Is Not Against the United States.

In Traux vs. Raich, 239 U. S., 33, the Court said:

> "As the bill is framed upon the theory that the act is unconstitutional and that the defendants, who are public officers concerned with the enforcement of the laws of the State, are about to proceed wrongfully to the complainant's injury, through interfering with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte* Young, 209 U. S., 123, 155, 161, which has repeatedly been followed."

Ludwig vs. West. Union Tel. Co., 216 U. S., 146.

Western Union Tel. Co. vs. Andrews, 216 U. S., 165.

Herndon vs. C. R. I. & P. R. R., 218 U. S., 135, 155.

Hopkins vs. Clemson College, 221 U. S., 636, 643, 645.

Philadelphia Co vs.. Stimson, 223 U. S., 605, 607, 620.

Home Tel. & Tel. Co. vs. Los Angeles, 227 U. S., 278, 293.

C.

The Questions Involved Are Constitutional Questions and, Therefore, Justiciable.

We ask the Court in the case at bar, in the determination of the question submitted, to construe the Constitution of the United States,

First, as to whether the so-called Eighteenth Amendment is a proper addition to the instrument, in view of the express and implied limitations contained in Article V, and,

Second, whether the National Prohibition Act, by Title II, is constitutional.

When the validity of the alleged Amendment and the constitutionality of the legislation thereunder is questioned, there is presented to this Court for determination a justiciable question. For the reasons set forth in the Bill of Complaint, and which are discussed in this brief, it is respectfully submitted a justiciable question has been presented.

Bott vs. Secretary of State, 63 N. J. L., 289, and cases cited therein;

United States vs. Lee, 106 U. S., 196, 208-9;

Kochler & Lange vs. Hill, 60 Iowa, 543, 603;

Hammond vs. Clark, 136 Ga., 312; 12 Corpus Juris, p. 880, and cases cited in note 36.

It is respectfully submitted that the motion of the defendants should be denied.

THOMAS F. MCCRAN,
Attorney General.

FRANCIS H. MCGEE,
Assistant Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

STATE OF NEW JERSEY, COMPLAINANT, *v.* A. MITCHELL PALMER, ATTORNEY GENERAL, and Daniel C. Roper, Commissioner of Internal Revenue, Defendants.	No. 30, Original.

BRIEF OF DEFENDANTS IN SUPPORT OF MOTION TO DISMISS.

This is an original bill filed in this court by the State of New Jersey against A. Mitchell Palmer, Attorney General of the United States, and Daniel C. Roper, Commissioner of Internal Revenue of the United States, the one alleged to be a citizen of the State of Pennsylvania, and the other a citizen of the State of South Carolina. The object of the bill is to have declared invalid the Eighteenth Amendment to the Constitution of the United States and the Act, known as the Volstead Act, passed by Congress to enforce that amendment, and to enjoin the officials named from enforcing, in the State of New Jersey, the Act in question.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provision of the Constitution relating to amendments is Article V, which is as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Section 205 of the Revised Statutes, taken from the Act of April 20, 1818, is as follows:

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become

valid, to all intents and purposes, as a part of the Constitution of the United States.

In December, 1917, by a vote of two-thirds of each House, Congress passed a resolution proposing an amendment to the Constitution of the United States as follows (40 Stat., 1050):

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:
>
> "ARTICLE —.
>
> "SECTION 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> "SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

On January 29, 1919, the legislatures of 36 of the States having ratified the amendment thus proposed, the Secretary of State issued his proclamation declaring the same a part of the Constitution. (40 Stat., 1941.) Subsequently, the legislatures of nine other States ratified, leaving only the States of Rhode Island, Connecticut and New Jersey not ratifying.

On October 28, 1919, Congress passed the Volstead Act, Title II of which provides that, upon the going into effect of the Eighteenth Amendment, the sale, manufacture, importation, or exportation of intoxicating liquor should be unlawful and prescribes penalties to be imposed upon offenders. Section 1 of Title II provides as follows:

> The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such

> sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

Section 3 provides that no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act. By section 6, the Commissioner of Internal Revenue is authorized to issue and prescribe the form of permits for the manufacture, sale, and transportation of liquor for nonbeverage purposes. And it is provided that no one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit—

> except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

Section 7 is as follows:

> No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription

is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

On March 2, 1920, the General Assembly of the State of New Jersey enacted the following statute:

An Act to prohibit the manufacture, sale or transportation within the State of New Jersey of intoxicating liquors for beverage purposes, defining the term "intoxicating liquors," and providing for the punishment of violations hereof.

Whereas, On February ninth, one thousand nine hundred and twenty, upon a public hearing before the joint committee of the Senate

and House of Assembly of New Jersey, evidence was produced and witnesses examined in an inquiry to ascertain the intoxicating quality of certain beverages, and it was then and there established to the satisfaction of the Legislature of the State of New Jersey that beverages containing alcohol not to exceed three and one-half per centum by volume were not in fact intoxicating.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. It shall be unlawful for any person, firm or corporation to manufacture, sell or transport within this State any intoxicating liquors for beverage purposes, and any person, firm or corporation violating the provisions hereof shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars for the first offense, and for a second offense five hundred dollars, or by imprisonment not exceeding three months, as the court may direct, or both; *provided*, said violation or offense shall be prosecuted only after indictment by a grand jury.

2. The term "intoxicating liquors," within the meaning of this act, shall be interpreted and is hereby defined to be any alcoholic beverage containing more than three and one-half per centum of alcohol by volume.

3. This act shall not be construed and is not intended in any sense or manner whatsoever to operate impliedly as a ratification of the so-called Eighteenth Amendment to the Constitution of the United States, or in recognition of the validity thereof.

4. This act shall take effect immediately, but shall not become operative until the cessation of the present state of war, as and when proclaimed by the President of the United States.

GROUNDS OF ATTACK.

The bill assails the Volstead Act (first) upon the ground that the Eighteenth Amendment is itself invalid, and (second) upon the ground that, even if the Eighteenth Amendment is a part of the Constitution, the Volstead Act, as a whole, is unconstitutional because not concurred in by the State of New Jersey, and (third) if the Volstead Act is not unconstitutional as a whole, that portion of it defining intoxicating liquors and that portion relating to the dispensing of liquors for medicinal purposes are unconstitutional.

In support of the claim that the Eighteenth Amendment is invalid, several propositions are advanced.

1. It is said that the nature of the amendment is such that its proposal by a two-thirds vote of each House of Congress and its ratification by the legislatures of three-fourths of the States cannot make it a part of the Constitution. The insistence is that—

(*a*) A constitution was understood in 1789 to be "an instrument prescribing, regulating and providing for the exercise of powers of government by the legislative, executive and judicial branches thereof, and not to be itself an exercise of such powers;" that the power to amend was extended by the Constitution "to alterations or additions which were in the nature of constitutional provisions, and did not extend to the exercise of ordinary legislative powers

regulating the conduct of life, morals and religion by private individuals nor of intrastate commerce;" and that the Eighteenth Amendment is a mere act of legislation as distinguished from an amendment within the meaning of Article V of the Constitution; and

(*b*) that no amendment which takes from a State any of the powers which have heretofore been reserved to it, and particularly the powers of police or internal economy, without its consent, is an amendment within the meaning of the Constitution.

2. It is insisted that, in order to comply with the provisions of Article V of the Constitution, it is necessary for Congress, either in the resolution proposing an amendment or in some other way, to declare that two-thirds of the Members of each House deem it necessary, and that the language in the resolution proposing the Eighteenth Amendment, "two-thirds of each House concurring therein," is not sufficient.

3. It is contended that, in those States whose constitutions contain a referendum feature, the action of the legislatures in ratifying is not final, but is subject to approval or disapproval by the people on a referendum vote.

If, however, the Eighteenth Amendment has become a part of the Constitution, it is next insisted that the Volstead Act is invalid—or, at least, is not in force in the State of New Jersey. This is based upon the contention that under section 2 of the amendment, providing that Congress and the several States shall have

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concurrent power to enforce the amendment by appropriate legislation, no Act of Congress to that end can be effective unless concurred in by the several States.

In the next place, it is insisted that if the Volstead Act, as a whole, is not invalid or effective in New Jersey, certain of its provisions are unconstitutional.

(*a*) The definition of intoxicating liquors is said to be unconstitutional because it embraces liquors which are not, in fact intoxicating; and

(*b*) It is insisted that the provisions relating to the dispensing of liquor for medicinal purposes and requiring a permit to be obtained before physicians may prescribe liquor is an unconstitutional interference with the right to practice medicine as regulated by the laws of New Jersey.

It will be seen that the entire complaint comes to the proposition that Congress has assumed to exercise legislative powers which belong exclusively to the State. The only effort to show that the State, as such, has any interest, aside from that of its citizens, who are also citizens of the United States, is the allegation that the enforcement of the Volstead Act will result in the destruction of a business from which the State has heretofore derived, and expected to continue to derive, a large income, and that some of the physicians whose right to dispense liquor in the practice of medicine is said to be interfered with are employed by the State in some of its institutions.

CONTENTIONS OF THE GOVERNMENT.

The contentions of the Government are:

1. The controversy sought to be presented is, in fact, one which involves merely the respective political powers of the Federal and State Governments and is not one which, at the instance of the State, is justiciable.

2. The question as to what is a proper amendment within the meaning of the Constitution has been committed solely to the Congress and the legislatures of the several States. It is purely a political question and in no sense justiciable.

3. The question of whether the amendment proposed by Congress has, in fact, been ratified and become a part of the Constitution is likewise a political question which has been determined by the political branch of the Government, and that decision will be followed by the courts.

4. The concurrent power of Congress and the States to legislate in the enforcement of the amendment is the power in each to enact separately such legislation as it deems necessary. The concurrence of both in the same legislation is not required. The Volstead Act, therefore, unless subject to some other constitutional objection, is a valid law, although it has not been concurred in by the legislature of any State.

5. A constitution or a constitutional amendment may establish a fundamental rule of law as well as provide the machinery of government. The Eighteenth Amendment does both.

6. One of the principal offices of the Constitution was to distribute the powers of government between the Federal Government and the State governments. One of the chief reasons for the power to amend was to render it possible to make such changes in this distribution of powers as experience should show to be necessary. It is, therefore, clearly within the amending power either to take from the Federal Government powers heretofore conferred or to take from the State governments powers heretofore reserved to them.

7. An amendment proposed and ratified in the manner provided in Article V is not made a part of the Constitution without the consent of the people of any State. Consent to such amendments as might be made as therein provided was given by each State when the Constitution was ratified, or acceded to, by it.

8. In ratifying an amendment the legislature of a State acts under powers derived alone from the Constitution of the United States, and from the people of the several States constituting the people of the United States, and these powers can not be taken away or restricted by any State law or constitution.

THE MOTION TO DISMISS.

The defendants have interposed a motion to dismiss upon which all of the questions above stated arise. The motion challenges the right of the State, as a litigant, to have the questions presented determined by the court and also challenges the soundness of the

contentions made against the validity of either the Eighteenth Amendment or the Volstead Act.

BRIEF.

I.

THE BILL PRESENTS NO CONTROVERSY OF WHICH THE COURT CAN TAKE JURISDICTION AT THE INSTANCE OF THE STATE OF NEW JERSEY.

A bill similar to this was recently filed in this court by the State of Rhode Island. A motion to dismiss that bill has been argued and is now under consideration by the court. In that case the Government contended that the bill, as a suit by a State, presented no justiciable controversy and could not be maintained. It was insisted that—

1. If a justiciable controversy can arise out of the facts alleged, it is a controversy wholly between individuals and corporations of the State of Rhode Island and these defendants or their subordinates, and not a controversy to which the State of Rhode Island is a real party.

2. The only controversy arising from the facts alleged to which the State of Rhode Island is, in any sense, a party is one over the right to legislate with regard to the liquor traffic; that is, a controversy between the State of Rhode Island, in its political capacity, and the United States, in its political capacity. The United States is really defendant in that controversy; and if the question is justiciable, it can not be determined in a suit to which the United States is not a party and in which the only defendants

are merely officials in the executive departments of the United States Government.

In the Rhode Island case, as in this, it was alleged that the enforcement of the Volstead Act would result in the destruction of a business from which the State had been accustomed to derive revenue, and from which it had expected to derive revenue in the future. The Government contended then, as now, that the fact that the law in question would interfere with the continuance of a business conducted by private persons, which, if continued, would be taxable by the State, did not give to the State such a direct interest in the controversy as would enable it to contest the constitutionality of the Act in the courts. In the present bill there is no other allegation of an interest on the part of the State unless it be the allegation that the State employs in some of its institutions licensed physicians whose right to prescribe liquor for medicinal purposes is restricted by the Volstead Act. This is plainly even a more remote and indirect interest than is involved in the destruction of a business which would otherwise produce revenue for the State. As in the Rhode Island case, therefore, the question presented is whether a State may, in the courts of the United States, assail the validity of an Act of Congress operating directly upon the persons and property of those who are citizens both of the State and the United States, for the purpose of enjoining the enforcement of the law by the seizure of private property and the prosecution of citizens in the Federal courts.

In the brief in the Rhode Island case, to which the court is referred, the Government has submitted its argument in support of the proposition that a State may not maintain such a suit. We will now only supplement briefly what is there said.

The substance of the suit is that the State of New Jersey seeks to enjoin the defendants, as officials of the United States Government, from arresting or seizing property of corporations or private individuals upon the ground that the Act of Congress under which they are acting is invalid. That the corporations or persons thus directly affected, when their property or rights are invaded thereunder, may be heard in the courts to contest the validity of the Act in question is, of course, admitted, but it is denied that the State may appear as a litigant *in limine* and fight their battles for them.

Only those whose rights or liabilities are affected by an attempted or threatened enforcement of a statute can question its constitutionality. *Supervisors* v. *Stanley*, 105 U. S. 305; *Red River Valley Bank* v. *Craig*, 181 U. S. 548; *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152; *Turpin* v. *Lemon*, 187 U. S. 51. This applies to a State as well as to any other person seeking to become a litigant.

This case differs from the Rhode Island case in only one respect. Since the Eighteenth Amendment became effective, the State of New Jersey has passed a prohibition Act. This Act, as quoted above, is a peculiar one. It seeks to put into effect a prohibition similar in words to that contained in the first

section of the Eighteenth Amendment by prohibiting the sale, manufacture, or transportation of intoxicating liquor in the State of New Jersey. It, however, contains a disclaimer that it recognizes that amendment as valid, or that the purpose is to put it into effect. *It is affirmatively not an attempt to enforce the Eighteenth Amendment.* It denies its legal existence. It therefore claims to derive no power or validity from section 2 of said amendment, but to be exerting only the powers it has always had. The Act then defines intoxicating liquors so as not to include beverages containing less than 3½ per cent of alcohol. This, however, in no way, affects the question of the right of the State to contest in the courts the validity of the Volstead Act. The result is that Congress has passed one Act and the State of New Jersey has passed another dealing with the same subject. Both Acts affect directly individuals and private property. Both operate upon those who are citizens of both governments. If, for any reason, either Act is unconstitutional the courts are open to those whose rights are affected to test it when a case arises. If there is such conflict between the two that one must prevail over the other, then the courts are open to the parties whose rights are affected to have it determined which shall prevail. Both the State and Federal Governments naturally are, in a sense, interested in these questions; but until a case arises in which the court must determine them, in order to decide an actual

controversy involving rights affected, this interest is purely an academic interest.

From the beginning of the Government, Congress has enacted such legislation as it thought was within the powers delegated to it by the Constitution, and the States have enacted such as they thought was within the powers reserved to them. Naturally, there has been much difference of opinion as to the existence of these respective powers; and there have been constant conflicts which has made it necessary for this court to determine whether either Congress or the States had acted within the powers conferred or reserved. It has never been supposed heretofore, however, that, in order to settle a difference of opinion between the Congress and a legislature as to these powers, the Federal Government could go into the courts as a litigant to have a State law declared unconstitutional, or that a State could invoke the jurisdiction of the courts to have an Act of Congress declared invalid. The invariable rule has been for each to exercise, independently of the other, the legislative powers which it thought it had and then leave the question of the validity of its legislative acts to be determined when challenged by some one whose rights were affected. Then, and only then, have the courts undertaken to pass upon the constitutionality of legislation. To recognize a State as a proper litigant to contest the validity of an Act of Congress merely upon the ground that its effect is to encroach upon the legislative or political rights of the State would be to reverse the rule of decision which

has prevailed since the beginning of the Government. Moreover, it would convert this court, under its original jurisdiction, into a forum for debates, not between actual litigants, but between the representatives of two governments, over the extent of their political powers.

In the last analysis, the theory of this case is that the defendants are without valid authority to cause persons to be arrested or property seized in the State of New Jersey, and that, in causing this to be done, they and their agents will be trespassers. To illustrate the fallacy of the contention that the State may maintain such a suit: Suppose these defendants, instead of being officials of the Federal Government, acting under a law of Congress, were merely private citizens of their respective States and for the purpose of enforcing some alleged private right were sending agents into the State of New Jersey with directions to seize and take possession of property belonging to citizens of that State. Undoubtedly, the citizens whose property was about to be taken could maintain an injunction suit. The State might cause the agents to be arrested and prosecuted for criminal trespass, but surely no one would suggest that the State of New Jersey would be a proper party to a bill to enjoin the threatened trespass. No more has it a status to enjoin a trespass upon property or persons when threatened under color of an unconstitutional Act of Congress. In both cases the rights affected are the rights of private citizens and not of the State, as such.

The foundation of suits against officers of the Government to enjoin their acts is that while claiming to act for the Government they are not so acting in fact (because transcending lawful authority), and therefore can be enjoined as individuals. Arlington Case, *United States* v. *Lee*, 106 U. S. 196.

The point is that, so long as the controversy is merely one between the political branch of the Federal Government and the political branch of a State government as to the scope of their respective powers, the question is not justiciable but is purely political. It becomes justiciable only when a decision of it is necessary to determine the rights of property or persons actually affected by the legislative Acts of one or both of these governments.

II.

NONE OF THE OBJECTIONS URGED TO THE VALIDITY OF EITHER THE EIGHTEENTH AMENDMENT OR THE VOLSTEAD ACT IS TENABLE.

The bill, as shown above, urges various reasons against the validity of both the Eighteenth Amendment and the Volstead Act. While the Government contends that none of these questions can properly be considered or determined in this case, they are all presented by litigants in other cases already heard, or to be heard with this case. The Government contends that some of these questions are political and not justiciable, and that, having been decided by the political branch of the Government, they are not open to review by the courts; and that, as to the remaining

questions, the contentions made are unsound. *This* contention has been argued in the briefs filed in the cases of the *State of Rhode Island* v. *A. Mitchell Palmer, et al.*, No. 29 Original, October Term, 1919; *George C. Dempsey* v. *Thomas J. Boynton, et al.*, No. 696, October Term, 1919; and *Kentucky Distilleries and Warehouse Co.* v. *W. V. Gregory, et al.*, No. 752, October Term, 1919, which have been recently heard, and also in the brief filed in the case of *Christian Feigenspan* v. *Joseph L. Bodine, et al.*, No. 788, October Term, 1919, which is to be heard at the same time with this case. In all of those cases, except the *Rhode Island* case, the questions are presented by parties who, as litigants, are asserting alleged invasions, actual or threatened, of individual rights. The arguments there presented by the Government are referred to if the court should find it necessary or proper to consider this case on its merits. A reargument of the same questions here would unnecessarily burden the court and hence will not be indulged in.

III.

CONCLUSION.

It is respectfully submitted that the motion to dismiss should be sustained.

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

MARCH, 1920.

○

Supreme Court of the United States.

October Term, 1919.

No. 30, Original.

STATE OF NEW JERSEY, *Complainant,*

v.

A. MITCHELL PALMER, ATTORNEY GENERAL, AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, *Defendants.*

Motion for Leave to File Brief as Amicus Curiae.

Now comes Alexander Lincoln and moves the Court for leave to file, in the above-entitled cause, the brief herewith exhibited.

ALEXANDER LINCOLN.

Office Supreme Court, U. S.
FILED
MAR 29 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

October Term, 1919.

No. 29, Original.

STATE OF NEW JERSEY,
COMPLAINANT,
v.
A. MITCHELL PALMER, Attorney General,
and
DANIEL C. ROPER,
Commissioner of Internal Revenue,
DEFENDANTS.

Brief of Alexander Lincoln As Amicus Curiae.

ANDREW B. GRISCOM & SON, LAW PRINTERS, NEWARK.

Supreme Court of the United States.

October Term, 1919.

No. 30, Original.

STATE OF NEW JERSEY, *Complainant,*

v.

A. MITCHELL PALMER, ATTORNEY GENERAL,

AND

DANIEL C. ROPER,

COMMISSIONER OF INTERNAL REVENUE,

Defendants.

Brief of Alexander Lincoln as Amicus Curiae.

Permission has been asked to file this brief on the two points covered by the two headings herein, because the points are conceived to be of primary importance, and in the hope that the reasons and authorities presented may be helpful and persuasive.

I.

The Principle that the Expression of One Exception Excludes Others Does Not Operate to Extend the Application of Article V to Additions and Changes to the Constitution beyond the Limits of the Power of Amendment Granted by That Article. That Power is Limited by the Ordinary Meaning of the Words Therein Used as well as by a Proper Construction of the Whole Instrument to Changes Consistent with the Nature and Purpose of the Constitution.

In the brief filed in the case of the State of Rhode Island on behalf of various states as *amici curiae*, the argument is made that in view of the express exceptions to the power of amendment contained in Article V other exceptions cannot be implied, by application of the principle "*expressio unius est exclusio alterius.*" This principle was referred to in questions asked by Mr. Justice Pitney during the argument.

In support of the case against the Eighteenth Amendment, the contention is made that that so-called amendment was not authorized by Article V and was beyond the power of the amending agency therein appointed, for these reasons:

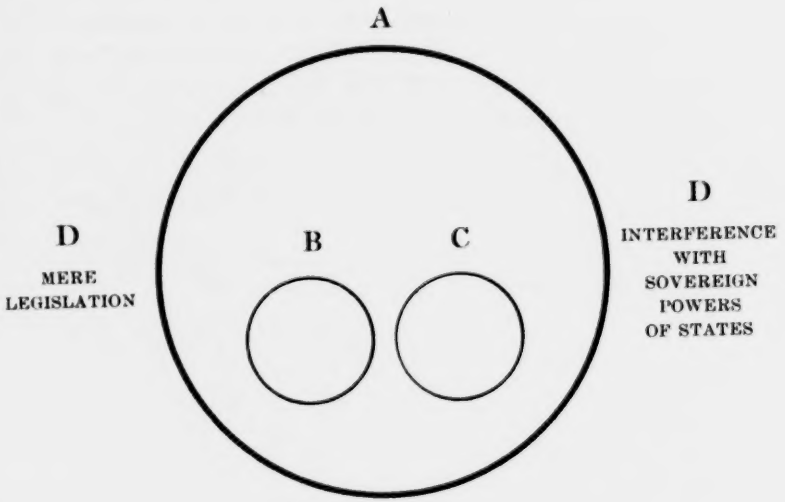
First, because it was mere legislation; *secondly*, because it was a direct and serious interference with the police power of the states and their right to local self-government; and, *lastly*, because the addition to the Constitution of any provision of either sort is outside the limits of the power of amendment granted by Article V (Brief of Alexander Lincoln and Michael J. Lynch, as Amici Curiae, filed in the case of the State of Rhode Island).

It is submitted that the principle that the expression

of one exception excludes other implied exceptions has no application here, because the limitations of the amending power which are the subject of the contention referred to are not implied, but are to be derived from a proper construction of the Constitution, and especially of the word "amendments" in Article V, as meaning the curing or correction of errors or defects, and as applicable only to changes germane to the thing to be amended. A provision making the number of senators from each state dependent in some way upon its population would, except for the proviso, be a real constitutional amendment, but a provision which is in no respect a "fundamental law" as distinguished from "an ordinary municipal law," or a provision depriving the states of their police power, or a provision attempting to destroy their sovereignty, or to repeal the whole Constitution, would not be an amendment of the Constitution.

For example, suppose A, owning parcels of real estate X, Y, and Z, gives to B a power of attorney to lease all his real estate except parcel X, and that B, claiming to act under the power, gives a deed of lot Y to a purchaser. Of course the fact that lot Y was not within the express exception does not give B a right to exercise a power with respect to it broader than the power granted.

This proposition may be illustrated by the following diagram:



In this diagram the circumference A represents the boundary of the amending power as defined both by the meaning of the words used in Article V, which contains the grant of that power, and by a proper construction of the Constitution as a whole. The circle B represents the exception relating to slavery (now obsolete) and C represents the exception that no state, without its consent, shall be deprived of its equal suffrage in the Senate. In the field D, outside the circumference A, lie all additions or changes to the Constitution which it would be beyond the power of the amending agency to make. The exceptions B and C, while doubtless they would exclude the implication of further exceptions *within* the circumference A, do not

remove or broaden the circumference A itself, which designates the boundary of the amending power. In the outside field D, we say, belong all provisions which are mere legislation and all provisions which tend directly to impair or destroy the sovereign powers of the states. Our proposition is precisely that the so-called eighteenth amendment lies in the field D outside the circumference A, both because it is mere legislation and because it tends directly to impair the sovereign powers of the states.

II.

The Words "Concurrent Power" are Not Properly Used to Describe the Powers Exercised by the States and Congress in That Class of Cases in Which the Action of the States is Held to be Valid until Congress Acts, but Invalid so far as it is in Conflict with the Action of Congress.

In the brief filed in the case of the Kentucky Distilleries & Warehouse Company on behalf of various states as *amici curiae,* the following proposition is made:

> "FOURTH: The provision in the Eighteenth Amendment that the Congress and the several States shall have concurrent power to enforce the Article by appropriate legislation is to be construed in accordance with the established principle in that class of cases, heretofore described as involving 'concurrent power,' in which the States may act until Congress sees fit to act and, when Congress does act, the exercise of its authority overrides all conflicting State legislation" (page 53).

Under this heading the proposition is stated in the following language:

> "It so happens that the expression '*concurrent power*' of the Nation and the States with respect to the same subject matter is an expression which has been used for a long period by the most authoritative writers as defining that class of cases in which the States may act until Congress has acted, and in which, when Congress has acted, its rule becomes the supreme law.
>
> . . . . . .
>
> "But the fact remains that this expression '*concurrent power*' has long been employed to describe exactly that situation" (pages 54, 55).

In support of this proposition, two decisions of the Supreme Court and two references to writers on the Constitution are cited as authority. The citations are as follows:

> *Ex parte Siebold*, 100 U.S. 371, 385.
> *Covington &c. Bridge Co.* v. *Kentucky*, 154 U.S. 204, 209, 211, 212.
> Story on the Constitution, sections 435, 438, 439.
> Willoughby on the Constitution, section 41.

It is submitted that the class of cases referred to is, and is shown by many decisions of the Supreme Court to be, one *not* where the states and Congress have *concurrent* power, but where particular acts in the exercise of their *exclusive* powers are or may be conflicting.

The cases usually referred to as examples of this class are cases of state laws incidentally affecting in-

terstate commerce, pilotage regulations, inspection and quarantine laws, the regulation of wharves, piers, and docks, harbor improvements, the construction of dams and bridges across the navigable waters of a state, and the establishment of ferries. In all these cases the authority of the states to act is founded upon their police power, and the authority of Congress is founded upon its power over interstate and foreign commerce. These powers are not in any respect concurrent, but belong exclusively to the states and to Congress respectively.

There are many cases where the Court has been called upon to define the boundaries of these powers in instances of conflict, and has laid down the rule that where Congress acts in the exercise of its exclusive power, state legislation, to the extent of the conflict, must be regarded as annulled, because the Constitution and laws of the United States made in pursuance thereof are the supreme law of the land.

Following are some of the important cases on this subject:

Gibbons v. *Ogden*, 9 Wheat. 1, 203-205, 209, 210:

> "But, the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the States.
>
> "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles pro-

duced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

"No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a

direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

. . . . . .

"Since, however, in exercising the power of reglating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him."

Sinnot v. *Davenport*, 22 How. 227, 242-244:

"It has been argued, however, that this act of the State is but the exercise of a police power, which power has not been surrendered to the General Government, but reserved to the States; and hence, even if the law should be found in conflict with the act of Congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

"This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of Gibbons *v.* Ogden. The court, in answer to it, observed: 'It has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other, like equal opposing forces.' But, the court say, the framers of the Constitution fore-

saw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress or treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . .

"We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question.

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act

of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

"This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the States. They surrendered this power to the General Government; and to the extent of the fair exercise of it by Congress, the act must be supreme.

"The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several States. Beyond these limits, the States have not surrendered their power over the subject, and may exercise it independently of any control or interference of the General Government; and there has been much controversy, and probably will continue to be, both by the bench and the bar, in fixing the true boundary line between the power of Congress under the commercial grant and the power reserved to the States. But in all these discussions, or nearly all of them, it has been admitted, that if the act of Congress fell clearly within the power conferred upon that body by the Constitution, there was an end of the controversy. The law of Congress was supreme.

"These questions have arisen under the quarantine and health laws of the States—laws imposing a tax upon imports and passengers, admitted to

have been passed under the police power of the States, and which had not been surrendered to the General Government. The laws of the States have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of Congress."

Escanaba Co. v. *Chicago*, 107 U.S. 678, 683:

"The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in

that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases. . . ."

Smith v. *Alabama*, 124 U.S. 465, 473:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist

in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

"There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however,

have been drawn in varied and numerous decisions of this court."

See also *Willson* v. *The Black Bird Creek Marsh Co.*, 2 Pet. 245.
City of New York v. *Miln*, 11 Pet. 102.
License Cases, 5 How. 504.
Passenger Cases, 7 How. 283.
Conway v. *Taylor's Executor*, 1 Black, 603.
Gilman v. *Philadelphia*, 3 Wall. 713.
Sherlock v. *Alling*, 93 U.S. 99.
Peik v. *Chicago &c. Ry. Co.*, 94 U.S. 164.
County of Mobile v. *Kimball*, 102 U.S. 691.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U.S. 196.
Brown v. *Houston*, 114 U.S. 622.
Leisy v. *Hardin*, 135 U.S. 100.
Austin v. *Tennessee*, 179 U.S. 343, 362, 370.
Southern Pacific Co. v. *Jensen*, 244 U.S. 205, 243-248.

The true meaning of the words "concurrent power" is stated in *The Passenger Cases*, 7 Howard, 283, 399, in the following language:

> "*A concurrent power excludes the idea of a dependent power.* The general government and a State exercise concurrent powers in taxing the people of the State. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. *A concurrent power in two distinct sovereignties, to regulate the same thing, is as inconsistent in principle as it is impracticable in action.*

It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must establish the rule. *If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action.*

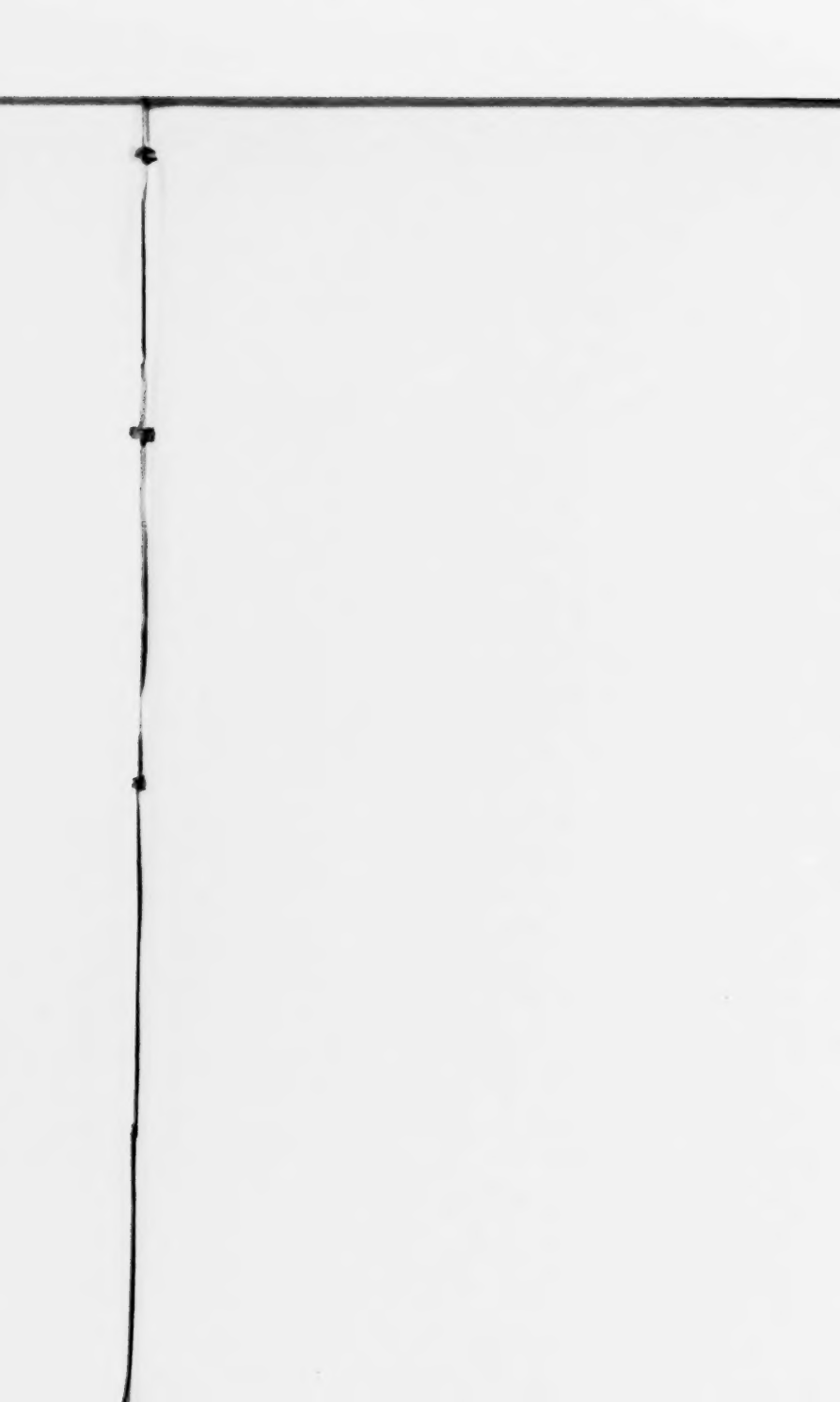
"But the argument is, that a State, acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject, and that the State must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the States. But this argument degrades the States by making their legislation, to the extent stated, subject to the will of Congress. State powers do not rest upon this basis. Congress can in no respect restrict or enlarge state powers, though they may adopt a state law. State powers are, at all times and under all circumstances, exercised independently of the general government, and are never declared void or inoperative except when they transcend state jurisdiction. And, on the same principle, the federal authority is void when exercised beyond its constitutional limits."

The words "concurrent power," as applied to the action of two distinct sovereignties upon the same subject matter, if they have any meaning, must in every

case, it is submitted, describe a power in the exercise of which the sovereignties must concur in order that the exercise shall be valid.

In re Mattson, 69 Fed. 535, 542.
Ex parte Desjeiro, 152 Fed. 1004, 1007.
Nielsen v. *Oregon*, 212 U.S. 315.

Respectfully submitted,
ALEXANDER LINCOLN,
Amicus Curiae.



NATIONAL PROHIBITION CASES.

ORIGINAL, AND APPEALS FROM THE DISTRICT COURTS OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, THE WESTERN DISTRICT OF KENTUCKY, THE DISTRICT OF NEW JERSEY, THE EASTERN DISTRICT OF WISCONSIN, AND THE EASTERN DISTRICT OF MISSOURI.

Nos. 29, 30, Original, and Nos. 696, 752, 788, 794, 837.—Argued March 8, 9, 10, 29, 30, 1920.—Decided June 7, 1920.

The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. P. 386.

The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Id. Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S. 276.

The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Id. Hawke* v. *Smith*, *ante*, 221.

The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution. *Id.*

That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument. *Id.*

The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits. *Id.*

350. Statement.

The second section of the Amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means. P. 387.

The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs. *Id.*

The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them. *Id.*

That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced. *Id.*

While there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, those limits are not transcended by the provision of the National Prohibition Act (Title II, § 1), wherein liquors containing as much as one-half of one per cent. of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Id.* *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Nos. 29 and 30, Original, bills dismissed; No. 794, reversed; Nos. 696, 752, 788 (264 Fed. Rep. 186), and 837, affirmed.

THE seven cases here given one name for convenient reference involved the validity of the Eighteenth Amendment and of certain general features of the National Prohibition Act designed for its enforcement. They were as follows:

No. 29, Original. *State of Rhode Island* v. *A. Mitchell Palmer, Attorney General,* and *Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

No. 30, Original. *State of New Jersey* v. *A. Mitchell Palmer, Attorney General,* and *Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

No. 696. *George C. Dempsey* v. *Thomas J. Boynton, United States Attorney for Massachusetts,* and *Andrew J. Casey, Acting Collector of Internal Revenue for Massachusetts.* Appeal from the District Court of the United States for the District of Massachusetts. Decree refusing injunction affirmed.

No. 752. *Kentucky Distilleries & Warehouse Company* v. *W. V. Gregory, District Attorney for the United States for the Western District of Kentucky,* and *Elwood Hamilton, Collector of Internal Revenue for the Collection District of Kentucky.* Appeal from the District Court of the United States for the Western District of Kentucky. Decree refusing injunction affirmed.

No. 788. *Christian Feigenspan, a corporation,* v. *Joseph L. Bodine, United States Attorney for the District of New Jersey,* and *Charles V. Duffey, Collector of Internal Revenue of the Fifth District of New Jersey.* Appeal from the District Court of the United States for the District of New Jersey. Decree refusing injunction affirmed.

No. 794. *Hiram A. Sawyer, as United States Attorney for the Eastern District of Wisconsin, Burt Williams, as Collector of Internal Revenue of the Second District of Wisconsin,* and *Thomas A. Delaney, as Federal Prohibition Enforcement Director for Wisconsin* v. *Manitowoc Products Company.* Appeal from the District Court of the United States for the Eastern District of Wisconsin. Decree granting injunction reversed.

No. 837. *St. Louis Brewing Association, a corporation,* v. *George H. Moore, Collector of Internal Revenue of the First District of Missouri, Walter L. Hensley, United States Attorney for the Eastern District of Missouri,* and *Frank L. Diggs, Prohibition Agent for the First Internal Revenue District of Missouri.* Appeal from the District Court of

the United States for the Eastern District of Missouri. Decree refusing injunction affirmed.

Mr. Herbert A. Rice, Attorney General of Rhode Island, for the plaintiff in No. 29, Original. *Mr. A. A. Capotosto*, Assistant Attorney General, was on the briefs. See *post*, p. 354.

Mr. Thomas F. McCran, Attorney General of New Jersey, for the plaintiff in No. 30, Original. *Mr. Francis H. McGee*, Assistant Attorney General, was on the briefs. See *post*, p. 356.

Mr. Patrick Henry Kelley for the appellant in No. 696. See *post*, p. 357.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for the appellant in No. 752. See *post*, p. 357.

Mr. Elihu Root and *Mr. William D. Guthrie* for the appellant in No. 788. *Mr. Robert Crain* and *Mr. Bernard Hershkopf* were on the briefs. See *post*, pp. 361, 368.

Mr. Ralph W. Jackman for the appellee in No. 794. *Mr. William H. Austin* was on the brief. See *post*, p. 380.

Mr. Charles A. Houts, *Mr. John T. Fitzsimmons* and *Mr. Edward C. Crow*, for the appellant in No. 837, submitted. See *post*, p. 380.

The Solicitor General and *Mr. William L. Frierson*, Assistant Attorney General of the United States, for the defendants in No. 29, Original, the appellees in Nos. 752 and 788, and the appellants in No. 794. *Mr. Frierson* for the defendants in No. 30, Original, and for the appellees in No. 696, *The Solicitor General* appearing also on the briefs

in those cases. *The Solicitor General* and *Mr. Frierson*, for the appellees in No. 837, submitted. See *post*, p. 381.

By leave of court, briefs of *amici curiæ* were filed, viz: By *Mr. Charles E. Hughes*, with the attorneys general of numerous States, supporting the motions to dismiss the bill in No. 29, Original, and against the appeal in No. 752; by *Mr. Elihu Root* with *Messrs. William D. Guthrie, Robert Crain* and *Bernard Hershkopf*, supporting the bill in No. 29, Original; by *Mr. Alexander Lincoln* with *Mr. Michael J. Lynch*, supporting the bills in Nos. 29 and 30, Original; by *Mr. Aaron A. Ferris*, supporting the bill in No. 29, Original; by *Mr. Wayne B. Wheeler* with *Messrs. George S. Hobart, G. Rowland Monroe, R. C. Minton, J. A. White, B. W. Hicks, E. L. McIntyre* and *Walter H. Bender*, against the appeals in Nos. 696, 752 and 788, and supporting the appeal in No. 794; and by *Mr. Levi Cooke* with *Mr. George R. Beneman*, supporting the appeal in No. 788.

The chief contentions made in the numerous arguments will be here indicated as fairly as space limits permit—more fully in some of the cases to avoid undue abridgment and repetition in all.

Mr. Rice, for the State of Rhode Island, in No. 29, Original, confined his argument to the validity of the Amendment. Various objections were stated, the one chiefly elaborated being that the Amendment is an invasion of the sovereignty of the complaining State and her people, not contemplated by the amending clause of the Constitution. The amending power, it was contended, is not a substantive power but a precautionary safeguard inserted incidentally to insure the ends set forth in that instrument against errors and oversights committed in its formation. Amendments, as the term indeed implies, are to be limited to the correction of such errors.

350. Argument for the State of Rhode Island.

The doctrine that any and every change may be introduced in guise of amendment is a novelty subversive of fundamental principles. It would bring about a constitutional revolution, converting the sovereignty of the people into a sovereignty of officials. It would permit the boundary between federal and state authority, established by the Constitution, to be shifted at will, as officials might be influenced by political cowardice or expediency, and would ultimately reduce the States to mere dependencies of the Federal Government.

All sovereignty resides in the people. The Constitution therefore was submitted for ratification to conventions chosen directly by the people. The possibility of federal encroachment upon state sovereignty was the subject of principal concern when the Constitution was in process of adoption, and, practically as a part of the process, the first ten amendments were added to prevent such encroachments. And it was generally understood and agreed that the boundaries set between state and federal powers were fundamental and permanent.

It is "This Constitution" that may be amended. "This Constitution" is not a code of transient laws but a framework of government and an embodiment of fundamental principles. By an amendment, the identity or purpose of the instrument is not to be changed; its defects may be cured, but "This Constitution" must remain. It would be the greatest absurdity to contend that there was a purpose to create a limited government and at the same time to confer upon that government a power to do away with its own limitations. All of the prior amendments have been declaratory and interpretative or have had relation to a power or to a subject-matter dealt with in the instrument itself. The amending function (under Art. V) is purely federal. The State is not a party to an amendment and her people do not participate. A legislature in ratifying does not act for the State and cannot limit her

sovereign powers. A State is bound in respect of sovereign powers only by the explicit act of her whole people. To be valid, an amendment must have such relation to the general grant of powers and to the scope and purposes of the Constitution as will carry an implication of assent on the part of the people of the United States, springing from their adoption of the Constitution.

In the case of this so-called amendment, the representatives of the people of the United States have attempted, not to amend the Constitution of the United States, but to amend the constitution of every State in the Union. If the amending function is construed as coextensive with absolute sovereignty, then the basis of our political system is no longer the right of the people of a State to make and alter their constitution, for their political institutions are at the mercy of others and may be changed against their will.

Mr. McCran, for the State of New Jersey, in No. 30, Original, attacked the Amendment as an invasion of state sovereignty not authorized by the amending clause and as not, properly speaking, an amendment, but legislation, revolutionary in character.

The right to amend the Constitution, in the manner provided by Article V, is a right incident to the powers of the citizens of the United States as distinguished from the right of the citizens of the respective States; no amendment can be made not of right belonging to the citizenship of the United States; all powers not enumerated and not of right belonging to the citizenship of the United States, are reserved to the respective States under Article X, including the right to legislate concerning the manufacture, use and sale intrastate of intoxicating liquors.

The Amendment is also invalid because its proposal was not affirmatively voted by two-thirds in number of both houses of Congress, and because the proposal did not on

its face disclose that both houses deemed the Amendment necessary.

Three-fourths of the States have not ratified it in the constitutional sense, because, in a number of the States counted, the proposal has been, or is subject to be, referred to the people, in pursuance of their constitutions.

Concurrent power under the Amendment is a power in the Federal Government to enforce it only as it relates to the external concerns of the United States or to the domain of the Federal Government in the regulation of interstate commerce heretofore recognized, as distinguished from the right of the State of New Jersey to enforce the Amendment intrastate by virtue of the power conferred upon her exclusively under the Amendment.

The National Prohibition Act is not appropriate legislation under the Amendment. It purports to regulate the manufacture, possession, sale and use of beverages which are not intoxicating and of liquor devoted to medicinal and other non-beverage uses.

Mr. Patrick Henry Kelley, for the appellant in No. 696, took the ground that the Amendment is not self-executing; that, until it is put in execution in the manner prescribed, the existing laws of the States concerning intoxicating liquors must stand unaffected; and that the only way in which the laws and sovereign powers of the States could be superseded under it would be by legislation enacted by the concurrent power of Congress and the several States in the only manner provided for such concurrent action, viz., as authorized by Article V of the Constitution.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for the appellant in No. 752:

The power of "amendment" contained in Art. V does not authorize the invasion of the sovereign powers expressly reserved to the States and the people by the Ninth

and Tenth Amendments, except with the consent of *all* the States. If it be argued that the expression of one exception in Art. V negatives the possibility of others to be implied, the answer is to be found in the contrary principle of construction applied by this court to Art. I, § 7, in *Hollingsworth* v. *Virginia*, 3 Dall. 378, that the existence of one exception to a power does not make the power unlimited in all other respects, but that there may be other qualifications or exceptions not expressed literally.

If amendment under Art. V were unlimited, three-fourths of the legislatures would have it in their power to establish a state religion and prohibit free exercise of other religious beliefs; to quarter a standing army in the houses of citizens; to do away with trial by jury and republican form of government; to repeal the provision for a president; and to abolish this court and with it the whole judicial power vested by the Constitution. See *Ableman* v. *Booth*, 21 How. 506, 521. They might form several new States within other States, and, at the same time, form one State by the junction of two or more others (while still giving the old States their equal suffrage in the Senate), and thus concentrate the entire power of the Government in the hands of a few States acting in concert. Indeed, if such right to amend exists, then the three-fourths required by Art. V can be reduced to a majority or even a minority of the legislatures, or the requirement be dispensed with entirely.

A construction should be judged by its consequences. The fact that a construction "radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people" is an irresistible argument against it, "in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 16 Wall. 36, 78.

The Ninth and Tenth Amendments must be read, with the whole Constitution, exactly as if they had been a part of it from the outset. Before their adoption they were implied, and, after their adoption, they were, by Art. V, "to all intents and purposes part of this Constitution." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405; *Collector* v. *Day*, 11 Wall. 113, 124; *Gordon* v. *United States*, 117 U. S. 697, 705; 2 Elliot's Debates, pp. 435, 436.

"The power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three-fourths of the States to grasp new power at the expense of any unwilling State." Curtis, Const. History of the United States, vol. 2, p. 160. Every one of the preceding seventeen amendments is concerned with and pertains to "the original provisions and powers of the Constitution." In addition, the Thirteenth, Fourteenth and Fifteenth Amendments were the result of the arbitrament of war, and their acceptance by the seceding States was made a condition of their readmission into the Union.

If it be decided that the legislatures of three-fourths of the States may, by ratification, validate any amendment, "the indestructible Union of indestructible States" will turn out to be a mere dream and the States will cease "to be coexistent with the National Government." *Texas* v. *White*, 7 Wall. 700, 725; *Lane County* v. *Oregon*, 7 Wall. 71, 76; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 31.

It is a well-known and established historical fact that the Constitution was ratified by the original States with the distinct agreement that the Bill of Rights expounded in the first ten amendments would be immediately adopted. The States went into the Union with the understanding that by these amendments the sovereignty of the several States would be perpetually preserved, against all federal

encroachments, and no sound reason can be advanced for maintaining that the Ninth and Tenth Amendments did not forever preserve such sovereignty. The powers reserved by those amendments are powers reserved from the operation of Art. V, as well as from the operation of any other articles of the Constitution.

Two-thirds of both houses of Congress did not vote to propose the Eighteenth Amendment; and hence, it was never properly submitted to the States for ratification.

The Eighteenth Amendment has not been ratified by the legislatures of three-fourths of the States. Of the forty-five States which have purported to ratify it, one of them,—Ohio,—has rejected the Amendment by popular vote; and in twelve others petitions for a referendum with respect to the Amendment have been presented, but have not yet been submitted to the electorate. In these States the people have reserved the right to make themselves a part of the "legislature."

The Eighteenth Amendment, like Art. V, must be construed with the other provisions of the Constitution (*Prout* v. *Starr*, 188 U. S. 537), including the Fifth Amendment, which, being for the security of person and property, should be construed liberally. *Boyd* v. *United States*, 116 U. S. 616, 635. The allegations of the bill in this case, which are admitted, establish that the plaintiff could not possibly have sold its stock of whiskey before the Amendment became effective, and that the demand for non-beverage purposes will be insignificant. To deprive of the power of sale is to take the property itself. *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445; *Wynehamer* v. *People*, 13 N. Y. 378, 387, 389, 396, 398. The liquor has therefore been taken by the Government for a public use, viz., for the protection of the people of the United States from the alleged evils of the traffic in intoxicating liquors. This court, as is pointed out in *Hamil-*

ton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, has never held that even statutes passed pursuant to the police power of the State could be applied to liquor acquired before the enactment of the prohibitory law. One of the judgments affirmed in *Mugler* v. *Kansas*, 123 U. S. 623, referred to in *Ruppert* v. *Caffey*, 251 U. S. at p. 302, was for violation of the act by selling beer acquired before its enactment, but the beer involved was acquired after the enactment of the prohibition amendment to the constitution of Kansas, pursuant to which the law was passed. If an attempt be made to extend the doctrine of the *Hamilton Case*, *supra*, so as to hold that the Volstead Act does not appropriate stocks of liquor existing before the Eighteenth Amendment was proposed by Congress, because an insignificant non-beverage use is still permitted, it is sufficient to call attention to the irreconcilable conflict between such contention and the rule in *Buchanan* v. *Warley*, *supra*. Although the prohibition of a particular physical use to which property may be put (so long as the possession and title thereto are not interfered with) may under some circumstances not constitute a taking in violation of the Fourteenth Amendment, even if the monetary value be reduced (*Mugler* v. *Kansas*, *supra*), yet when, as here, the owner of the property is deprived of the rights of sale, transportation, and even of possession and use (except in a few limited instances) there is a taking of property. The whiskey sought here to be protected was manufactured on the faith of the rules of property established by decisions of this court.

Mr. Root for the appellant in No. 788:

I. The substantive and operative part of the so-called Eighteenth Amendment is contained in its first section. This provision does not relate to the powers or organization of government, as does an ordinary constitutional

provision. On the contrary, it is itself an exercise of the legislative power of government, and a direct act of legislation regulating the conduct of life of the individual. The first question before the court is, therefore, whether Article V of the Constitution authorizes any amendment which in substance and effect is merely a police regulation or statute.

To uphold such a power of amendment would do violence to what Hamilton (Federalist, No. 22, p. 135, Ford's ed.) described as "the fundamental maxim of republican government . . . which requires that the sense of the majority should prevail." If the so-called Eighteenth Amendment be a valid part of the Constitution, its repeal can hereafter be perpetually prevented by a minority, for if but one State more than one-fourth of the States refuse to assent thereto, it is irrepealable. The census of 1910 discloses that there are in the Union thirteen States whose aggregate population does not equal five per cent. of the entire population of the United States. Consequently, however vast the majority of the population in the future may be who are persuaded by experience that this direct legislative regulation of their lives and personal habits was or has become unwise and unnecessary, they will be helpless to change the law if there be dissent on the part of a minority representing only five per cent. of the population or perhaps less.

There is plainly a distinction in this respect between the so-called amendment as adopted and as it would be if it had conferred *power* upon Congress to prohibit the use of intoxicating liquors. An amendment in the latter form would, it is true, be precisely as irrepealable as the one here in question, but the conduct of individual life thereunder would at all times be within the control of representatives of the majority of the people. Congress would then have the power to prohibit intoxicants or not, completely or qualifiedly, as it from time to time deemed

best; and if the majority of the people then desired prohibition, Congress could respond to their wish; and if, on the other hand, the majority thereafter became persuaded that extreme prohibition was no longer necessary, in that respect also Congress could effectuate the will of the people. In every free government the direct regulation of the lives of the people by legislation should at all times be in the hands of the majority, however the powers of government may be distributed and allocated.

This fundamental consideration differentiates sharply the Eighteenth Amendment from the Thirteenth Amendment, to which the Eighteenth bears a superficial resemblance. As is now universally conceded, slavery was the creation of positive law, and it was always unauthorized unless some exercise of government permitted it. A constitutional declaration that slavery was prohibited, would, therefore, in substance, be only the withdrawal from every governmental authority of the *power* to license or permit involuntary servitude. That amendment, consequently, only affected the *powers* of government, and did not constitute, as does the so-called Eighteenth Amendment, a direct legislative exercise of those powers.

Article V of the Constitution should not be construed to confer unlimited legislative power upon the amending authorities. To assume that it does is inconsistent with the plain provision of § 1 of Article I of the Constitution that "*all* legislative powers herein granted shall be vested in a Congress of the United States," and with the terms of Article V itself, as the proceedings of the Constitutional Convention disclose that the framers themselves understood those terms. The framers undoubtedly regarded the power to amend only as authorizing the inclusion of matter of the same general character as the instrument or thing to be amended; and as all the constitutions of their day were concerned solely with the distribution and limitation of the powers of government,

and not with the direct exercise thereof by the constitution makers themselves, no amendment of the latter sort would have been deemed appropriate or germane by them.

It does not advance the discussion to urge that *the people* can adopt any amendment to the Constitution they see fit. No doubt an amendment of any sort could be adopted by the same means as were employed in the adoption of the Constitution itself. In that manner alone do or can *the people* themselves act. But the amending authorities provided for in Article V of the Constitution, as clearly appears from the debates in the Constitutional Convention, are only *agents* of the people and not the people themselves. They must, therefore, act within the authority conferred in Article V, and that authority does not embrace the right under color of amendment to adopt mere sumptuary laws which are not constitutional amendments in truth or essence. The people could by appropriate proceedings amend the Constitution so as to impair such vital rights as freedom of religion, but it is inconceivable that any such unlimited power has been delegated to the amending agents, who may represent but a minority of the people. The census discloses that there are three-fourths of the States of the Union whose total population amounts to less than forty-five per cent. of the people of the United States, and two-thirds of a quorum of both houses of Congress may, therefore, likewise represent only a minority of the population.

Ratification by state legislatures does not as matter of fact provide an opportunity for the people to express their will regarding the proposed Eighteenth Amendment as the calling of conventions might have done. Thus, for example, the Missouri legislature ratified it, notwithstanding an express provision of the Missouri constitution (Art. II, § 3) forbidding them so to do, and in Ohio ratification by the legislature was subsequently rejected by the people at the polls, while in other States the people

have been denied all right to have the question of ratification referred to them for approval.

If, as contended by the defendants, the power of amendment vested in Congress and three-fourths of the state legislatures be absolute and unrestricted, then there would be no limitation whatever upon their legislative authority. They could then by amendment establish a state religion, or oppress or discriminate against any denomination, or authorize the taking away of life, liberty and property, without due process of law, etc., etc. This would destroy the most essential limitation upon power under the American system of government, which is that the rights of the individual citizen shall be protected by withholding from the legislative function the power to do certain things inconsistent with individual liberty. This was the reason of the irresistible demand for the first ten amendments.

When the Federal Constitution was adopted, the people of practically every State had limited by bills of rights their own governments in their own States, which were composed of men elected by themselves. We are not at liberty to assume that in and by Article V it was contemplated that they were vesting legislative power without limitation in the Congress and the legislatures of three-quarters of the States. For these reasons and others it is submitted that the adoption of the so-called Eighteenth Amendment by the agents of the people was beyond the amending power of such agents and therefore invalid.[1]

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[1] Journal of Constitutional Convention of 1787, pp. 370, 70; 3 Documentary History of U. S. Constitution, pp. 405, 409, 410, 518; *McCulloch* v. *Maryland*, 4 Wheat. 316, 403, 407; *Cohens* v. *Virginia*, 6 Wheat. 264, 389; *State ex rel. Mullen* v. *Howell*, 107 Washington, 167; *Opinion of the Justices*, 118 Maine, 544; Federalist, No. 33 (Ford's ed.), pp. 202, 260, 263; 2 Elliot's Debates, pp. 126, 128, 364; 4 *id.*, pp. 144, 176, 188; 1 Bryce's American Commonwealth, p. 350; Story on the Constitution, 5th ed., § 352; Cooley on Constitutional Limitations,

II. The Eighteenth Amendment, furthermore, if valid, would tend to undermine a fundamental principle of our federal system. As Chief Justice Chase declared in *Texas* v. *White*, 7 Wall. 700, 725, "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Manifestly, the federal system of government created in the Constitution contemplated indestructible States—not indestructible geographic units merely, but indestructible self-governing, local sovereignties. The establishment of our dual system of government must necessarily imply that neither government shall be permitted to destroy the other, and that the States must be preserved, not as mere electoral and administrative districts of a unified and consolidated national government, but as true local, self-governing sovereignties, inviolate and indestructible members of a dual, and not a consolidated, system of government, and with a perma-

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7th ed., pp. 2–4, 50; Jameson on Constitutional Conventions, 4th ed., §§ 63, 85; *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308; Century Dictionary, tit. "Constitution"; Encyclopædia Britannica (9th ed.), tit. "Constitution"; Holland's Jurisprudence, 11th ed., p. 365; The Constitutional Review, April, 1918, p. 97; Mass. Law Quarterly, May, 1918, p. 334; *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205, 227; Federalist, No. 15 (Ford's ed.), p. 87; *Marbury* v. *Madison*, 1 Cranch, 137, 176; *In re Pennsylvania Tel. Co.*, 2 Chester Co. Rep. 129; 5 Hinds' Precedents, §§ 5753, 5767; *Gagnon* v. *United States*, 193 U. S. 451, 457; *Shields* v. *Barrow*, 17 How. 130, 144; Federalist No. 43 (Ford's ed.), p. 291; *id.*, No. 85, p. 586; 3 Elliot's Debates, pp. 233–4; *Commonwealth* v. *Griest*, 196 Pa. St. 396, 404; *Warfield* v. *Vandiver*, 101 Md. 78; *Livermore* v. *Waite*, 102 Cal. 113, 118, 119; *Gibbons* v. *Ogden*, 9 Wheat. 1, 187, 188; *Calder* v. *Bull*, 3 Dall. 386, 388; *Fletcher* v. *Peck*, 6 Cranch, 87, 139; *Loan Association* v. *Topeka*, 20 Wall. 655, 663; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Collector* v. *Day*, 11 Wall. 113, 127; *Hollingsworth* v. *Virginia*, 3 Dall. 378; Madison's Notes, Sept. 12, 1787, p. 720, *Legal Tender Cases*, 12 Wall. 457; *Texas* v. *White*, 7 Wall. 700, 720, 724; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 192; 3 Elliot's Debates, pp. 446–7; *Somerset* v. *Stewart*, 20 State Trials, 1, 82; 2 Mass. Law Quarterly, pp. 437–44; *Slaughter-House Cases*, 16 Wall. 36, 67, 68.

nent and effectual reason for being, namely, the possession of the power and the right to exercise forever the functions of internal and local self-government.

The so-called Eighteenth Amendment *directly* invades the police powers of the States and *directly* encroaches upon their right of local self-government. If this amendment be valid, then any amendment which directly impairs the police powers of the States and absolutely withdraws from them their right to local self-government in any important particular, heretofore indisputably a matter of internal concern, must likewise be valid. In other words, if the so-called Eighteenth Amendment be lawful, then the States are not in truth indestructible. It must be manifest that the precedent necessarily erected by a holding that the Eighteenth Amendment is constitutional, would authorize the complete subversion of our dual and federal system of government. It is submitted that the authority conferred in Article V to amend the Constitution carries no power to destroy its federal principle in a most fundamental aspect.

The Civil War amendments afford no justification for the Eighteenth Amendment. Their primary purpose was to crystallize into the Constitution some of the essentials of a free republican government, and it was expressly made the constitutional duty of the Federal Government to guarantee to the States such a form of government. This federal duty the Civil War amendments helped to realize; and the fact that, as an incident and indirectly, they interfered to some extent with the States is of no consequence. They are not like the Eighteenth Amendment, which is germane to no original federal duty, and which directly, primarily and deliberately invades the right of the States to govern themselves.[1]

[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 327, 403, 431; *Cohens* v. *Virginia*, 6 Wheat. 264, 389; *Texas* v. *White*, 7 Wall. 700, 725, 728; *Hammer* v. *Dagenhart*, 247 U. S. 251, 275; *Gordon* v. *United States*, 117

Mr. Guthrie for the appellant in No. 788:

The correct construction of § 2 of the Eighteenth Amendment required the concurrence of the State of New Jersey in any legislation of Congress regulating internal or intrastate commerce in intoxicating liquors, and conversely required the concurrence of Congress in any legislation of the State regulating interstate or foreign commerce in intoxicating liquors; but that section did not impair or qualify the existing reserved power of the several States independently to regulate their own internal or intrastate commerce or the existing power of

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U. S. 697, 701, 705; *Rathbone* v. *Wirth*, 150 N. Y. 459, 470, 483–4; *Calder* v. *Bull*, 3 Dall. 386, 388; *Loan Association* v. *Topeka*, 20 Wall. 655, 662–3; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *Collector* v. *Day*, 11 Wall. 113, 124, 125, 127; *Downes* v. *Bidwell*, 182 U. S. 244, 290–1; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Matter of Fraser* v. *Brown*, 203 N. Y. 136, 143; *Keller* v. *United States*, 213 U. S. 138, 148; *Colon* v. *Lisk*, 153 N. Y. 188, 194; *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Civil Rights Cases*, 109 U. S. 3, 11–15, 19, 20; *In re Rahrer*, 140 U. S. 545, 554–6; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina* v. *United States*, 199 U. S. 437, 448, 451, 453–4; *State ex rel. Mullen* v. *Howell*, 107 Washington, 167; *License Cases*, 5 How. 504, 583, 628; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59; *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 300; *Patterson* v. *Kentucky*, 97 U. S. 501, 503; *Fertilizing Co.* v. *Hyde Park*, *id.*, 659, 667; *Ex parte Rowe*, 4 Ala. App. 254; *Stone* v. *Mississippi*, 101 U. S. 814, 819–20; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 567; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; 2 Hare on American Constitutional Law, p. 766; Cooley on Constitutional Limitations (7th ed.), pp. 101–2, 243, 263; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629; *Lane County* v. *Oregon*, 7 Wall. 71, 76; *Ex parte Bain*, 121 U. S. 1, 12; Story on the Constitution, § 1908; *Slaughter-House Cases*, 16 Wall. 36, 67, 68, 70–1, 77–8; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 348; *Kentucky* v. *Dennison*, 24 How. 66, 107; *Guinn* v. *United States*, 238 U. S. 347, 362; *United States* v. *Railroad Co.*, 17 Wall. 322, 327; *Pollock* v. *Farmers' Loan & Tr. Co.*, 157 U. S. 429, 584; Congressional Globe, 38th Cong., 1st sess., p. 2985; Elliot's Debates, vol. II, pp. 304, 309; vol. IV, pp. 53, 58; 2 Curtis on the Constitutional History of the United States, pp. 160–1; Miller on the Constitution, pp. 24, 412; 1 Tucker on the Con-

Congress to regulate interstate or foreign commerce or the internal commerce of the District of Columbia, the Territories, or the Insular Possessions.

The prohibition contained in § 1 of the Amendment is self-executing. *Civil Rights Cases*, 109 U. S. 3, 20. If the Amendment contained no grant of power of enforcement, Congress would have complete power to enforce the prohibition as it saw fit in interstate or foreign commerce or domestically in the District of Columbia, etc., and the States would have power to enforce it within their respective jurisdictions as to their intrastate or internal commerce. But Congress then would have no power under the Constitution to legislate in respect of the internal commerce of a State even with its consent and a State could not constitutionally legislate in respect of interstate or foreign commerce without the assent or concurrence of Congress. The second section of the Amendment granted to Congress the additional or supplemental power to authorize federal officers to enter the States and apply and enforce the sanctions of federal or state legislation in respect of their internal affairs provided the State concurred in such legislation, and it granted to the respective States the power to apply and enforce their legislation or the legislation of Congress against interstate and foreign

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stitution, pp. 323–4; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 554, 555; *Wilkinson* v. *Leland*, 2 Pet. 627, 647, 657; *State* v. *Keith*, 63 N. Car. 140, 144; *Eason* v. *State*, 11 Ark. 481, 491; *Coyle* v. *Oklahoma*, 221 U. S. 559, 580; 2 Madison's Notes (Farrand), pp. 629–31; *Maxwell* v. *Dow*, 176 U. S. 581, 601–2; *State* v. *St. Louis & S. W. Ry. Co.*, 197 S. W. 1012, 1013 (Tex.); *Alexander* v. *People*, 7 Colo. 155, 167; Federalist (Ford's ed.), Nos. 39 and 43, pp. 251, 291–2; *Spies* v. *Illinois*, 123 U. S. 131, 161; *Barron* v. *Baltimore*, 7 Pet. 243, 250; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 217; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Bartemeyer* v. *Iowa*, 18 Wall. 129, 138; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *In re Kemmler*, 136 U. S. 436, 448, 449; *Stewart* v. *Kahn*, 11 Wall. 493, 507; *Dred Scott* v. *Sandford*, 19 How. 393; Cong. Globe, 39th Congress, 1st sess., pt. 3, p. 2766; *id.*, pt. 4, p. 2961.

commerce, provided Congress concurred in such state legislation.

This construction would give reasonable scope and effect to § 2 and every word thereof; would be consistent with the plan and provisions of the Constitution as a whole; would recognize the dual sovereignty in our federal system of Nation and State each supreme within its own sphere; would tend to promote coöperation and harmonious, effective, economical and satisfactory enforcement of the prohibition of intoxicating liquors, and would be efficient, conservative and beneficent as a practical method of enforcement. In other words, such a construction would not interfere with the power of Nation or State within their respective and exclusive spheres, would provide for coöperation in enforcement when found desirable, and would make fixed and permanent the constitutional principle and the governmental policy embodied in the acts of Congress known as the Wilson Act of August 8, 1890, the Webb-Kenyon Act of March 1, 1913, and the Reed Amendment of March 3, 1917. Indeed, the learned Assistant Attorney General urged, after referring to the decisions of the court in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, and *United States* v. *Hill*, 248 U. S. 420, that § 2 of the Amendment in providing for concurrent power was not revolutionary or an innovation in principle, but made a permanent part of the Constitution the principle upon which these three intoxicating liquor statutes of Congress had been sustained.

Section 2 of the Amendment in providing for concurrent power of enforcement is unique and unprecedented and a departure from the precedents of the Thirteenth, Fourteenth and Fifteenth Amendments. The different form was adopted and submitted to the States for their approval undoubtedly because more likely to be acceptable if the States were retaining a voice in regulations affecting their

own internal affairs. The controlling inquiry, however, is not so much what Congress itself understood as what the States reasonably understood from the language of the proposed Amendment as submitted by Congress. *State* v. *St. Louis & S. W. Ry. Co.*, 197 S. W. 1012, 1013; *Alexander* v. *People*, 7 Colorado, 155, 167; *White* v. *Hoyt*, 73 N. Y. 505, 511. Did they understand that they were surrendering to Congress their then exclusive legislative power over the internal traffic in intoxicating liquors? Did they understand that they were turning over to Congress practically supreme control over intrastate regulation in all its phases? Would not such a radical and far-reaching surrender and new delegation of power to Congress, in conflict with our traditions and history and our dual system, have readily found apt and direct expression?

Section 1 shows that the controlling thought of Congress was to secure national prohibition; and § 2 shows a purpose to commend this main proposal to the States for their acceptance by assuring them of the least possible interference with their police powers. This would tend to secure ratification when a proposition to surrender or abdicate their police powers would probably have been rejected. The question, therefore, upon which state legislatures voted was, Shall there be national prohibition without loss of state control over local affairs? The construction now urged by the Government, however, would result practically in complete loss of state control. Disguise it as they may, the learned counsel for the Government ask the court to give no practical effect whatever to the clause which was the inducement to the States to ratify the proposed prohibition Amendment.

The history of the proposed Amendment in the Sixty-fifth Congress should be traced and the following facts emphasized, namely, that both houses rejected the form originally proposed which vested power in "the Congress and the several States independently or concurrently to

enforce" the proposed Amendment; that the Senate adopted on August 1, 1917, a form limiting the power of enforcement to Congress alone as in the prior constitutional amendments, that this form was not acceptable to the House, and that the Amendment made by the House and concurred in by the Senate vested in "the Congress and the several States . . . concurrent power to enforce." The significance and effect of this amendment cannot be disregarded unless it is to be held that the change of wording made no change whatever in practical meaning, and that the language of the modification made by the House can be disregarded as of no practical effect whatever notwithstanding "the elementary canon of construction which requires that effect be given to every word of the Constitution" as declared in *Knowlton* v. *Moore*, 178 U. S. 41, 87; and see also *Hurtado* v. *California*, 110 U. S. 516, 534; *Holmes* v. *Jennison*, 14 Pet. 540, 570–571; *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218; *Schick* v. *United States*, 195 U. S. 65, 68; *Newell* v. *People*, 7 N. Y. 9, 97; Cooley's Constitutional Limitations, 7th ed., p. 92.

Ordinary definitions of the adjective "concurrent" show its current meaning to be "concurring or acting in conjunction; agreeing in the same act, contributing to the same event or effect; operating with; coincident" (Century Dictionary). See also Webster and Standard Dictionaries. The exact meaning can be determined by a consideration of the subject-matter, probable purpose and context. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 19; 1 Story on the Constitution, § 455; *Wedding* v. *Meyler*, 192 U. S. 573, 584; *In re Mattson*, 69 Fed. Rep. 535, 542; *Ex parte Desjeiro*, 152 Fed. Rep. 1004, 1007; *Nielsen* v. *Oregon*, 212 U. S. 315.

For thirty years prior to the framing of the Eighteenth Amendment there had been a public movement and tendency to secure coöperation, that is, *concurrence*,

between Nation and State in the regulation and prohibition of intoxicating liquors, as evidenced by the legislation of Congress in the Wilson Act in 1890, the Webb-Kenyon Act in 1913, and the Reed Amendment in 1917. The Wilson Act was based upon the language of this court in *Leisy* v. *Hardin*, 135 U. S. 100, 119, which suggested that the States could regulate interstate commerce in intoxicating liquors if Congress assented by appropriate legislation, and the act was upheld upon that theory, not only in respect of interstate commerce, but in respect of foreign commerce as well. *In re Rahrer*, 140 U. S. 545; *Delamater* v. *South Dakota*, 205 U. S. 93; *De Bary* v. *Louisiana*, 227 U. S. 108. In furtherance of this policy of coöperation and *concurrence* with the States, which thus began with the Wilson Law in 1890, Congress passed the Webb-Kenyon Law of 1913, and the Reed Amendment of 1917. *Vance* v. *Vandercook Company*, 170 U. S. 438; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420. The Chief Justice declared in the *Clark Distilling Co. Case* that the regulation of intoxicating liquors was "a subject as to which both State and Nation in their respective spheres of authority possessed supremest authority" and that "Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation between the local and national forces of government to the end of preserving the rights of all." *Slaughter-House Cases*, 16 Wall. 36, 78. Under these acts of Congress there was no uniformity as to regulation of interstate commerce in intoxicating liquors, for such commerce was subjected to the varying regulations of the respective States.

The Eighteenth Amendment, therefore, embodied in a permanent constitutional provision a principle that had

been judicially sustained as within the scope of the constitutional power of Congress, though not without dissent in this court and on the part of President Taft and the then Attorney General, and it had been a matter of grave constitutional controversy in Congress and in the forum of public opinion whether the decisions of this court were based on sound reasoning and tenable grounds.

The principal ground upon which the supremacy of the National Prohibition Act was deduced by the learned court below, even as to intrastate regulation, was that by Article VI the Constitution and all laws and treaties made in pursuance thereof are declared to be the supreme law of the land, anything in any state constitution or statute to the contrary notwithstanding. But Article VI applies and controls only when an act of Congress is passed *in pursuance* of the Constitution, and if the Eighteenth Amendment requires the concurrence of the State, an act of Congress without such concurrence cannot be said to have been passed in pursuance of the Constitution. Indeed, it should logically and reasonably follow that the insertion of the word "concurrent" in the Eighteenth Amendment was for the very purpose of preventing Article VI from operating to make the legislation of Congress supreme and practically exclusive. It begs the whole question to advance Article VI as controlling.

The clause vesting concurrent power cannot mean one thing as applied to the action of the several States, and quite another and different thing when applied to the action of Congress. It cannot mean that if there be conflict, the action of Congress must control, for that would plainly be to say that the power of the States was not concurrent, but subordinate, and, in practical effect, no power at all. *Wedding* v. *Meyler*, 192 U. S. 573, 584; *Nielsen* v. *Oregon*, 212 U. S. 315; *In re Mattson*, 69 Fed. Rep. 535, 542; *Ex parte Desjeiro*, 152 Fed. Rep. 1004, 1007; *Houston* v. *Moore*, 5 Wheat. 1, 22; *Passenger Cases*, 7 How.

282, 395, 396, 399. If, therefore, the clause in question does not authorize the States to invade the field of federal jurisdiction, *i. e.*, interstate and foreign commerce, without the concurrence of Congress, it would be illogical to argue that it authorized Congress to invade the field of state jurisdiction without the concurrence of the States.

It is not contended by the appellant that Congress and the several States must adopt identical or practically identical enforcement measures, or that any enforcement act adopted by one must be wholly inoperative if not adopted by the other. But it is assumed that no unnecessary fundamental change in the federal system and its controlling and vivifying spirit was intended or contemplated, that the Nation and the State were to continue supreme and independent each within its own historic and constitutional sphere, that no undue interference of one with the other was intended, and that additional or supplemental power was being granted to both, which would authorize each to enter the sphere of the other provided the latter concurred; in other words, coöperated by concurring.

The appellant further contends that Title II of the National Prohibition Act is unconstitutional in certain particulars because not appropriate legislation and because it contains arbitrary and oppressive provisions depriving persons of their property rights without due process of law.

It is conceded of record by the Government and not challenged in its argument that the definition contained in § 1 of Title II of the National Prohibition Act includes beverages which are as matter of fact non-intoxicating. The prohibition of the Eighteenth Amendment, however, is expressly limited to intoxicating liquors.

The power of Congress in peace times to enforce the specific prohibition of intoxicating liquors is not as broad and comprehensive as the police powers of the States.

The case of *Ruppert* v. *Caffey*, 251 U. S. 264, does not hold otherwise. The court was then dealing solely with the war power of Congress, which is the highest attribute of governmental sovereignty, and the comparison in the opinion in that case with the state police power as an analogy was merely to illustrate freedom from restraint.

Incidental power to enforce a grant of power to Congress cannot be used to enlarge and expand the grant itself—particularly when to allow it would impinge upon the reserved powers of the States. *Civil Rights Cases*, 109 U. S. 3. The mere fact that the prohibition of non-intoxicating beverages may in the judgment of Congress tend to aid and render more effective the enforcement of prohibition against intoxicating liquors is insufficient. *United States* v. *Dewitt*, 9 Wall. 41; *Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *United States*, 203 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251.

The first section of Title II of the National Prohibition Act plainly purports to constitute no more than a definition of the term "intoxicating liquors" as used in the Eighteenth Amendment. It was enacted as and for a definition, and that is its declared intent. The provision might not have been enacted had its wording been changed so as to declare that it was in truth not a definition at all, but was being inserted in the act because it was believed to be advisable to include non-intoxicating liquors in order more effectively to enforce the prohibition against intoxicating liquors. The definition of an intoxicating liquor is one distinct and concrete idea and intent; the banning of non-intoxicating liquors as an incidental measure of enforcement is quite a different idea and intent.

No more objectionable or dangerous doctrine could be imagined than that an enactment, clearly avowed and intended to be a definition of a constitutional term and

having in view solely that purpose and end, can be sustained as an exercise of a very different power and intent having in view a different end and supported by entirely different considerations—an intent and purpose that may not have been in the minds of Congress at the time. Such a practice, if tolerated, would enable the courts to attribute to a statute a meaning and effect not at all contemplated or understood by those who enacted it, and possibly in conflict with their actual intent.

It may be proper, in reviewing state legislation which has been upheld by a state court as within the legislative powers of a State, for this court to attribute the intent as found by the state court, and not at all permissible to attribute an intent not expressed in the case of a provision in an act of Congress purporting on its face solely to be a definition and passed in the exercise of a distinctly limited power of legislation—as here limited to intoxicating liquors. Congress is always exercising delegated, limited, circumscribed and enumerated powers, and not the broad and elastic police powers of a State.

The Eighteenth Amendment must be read in connection with the Tenth Amendment. It could not have been intended by the use of the phrase "appropriate legislation" to authorize Congress to construe a prohibition limited to intoxicating liquors as including authority to regulate the vast field of non-intoxicating beverages, which the Amendment itself had left unprohibited and therefore free for state regulation.

Sixty years of regulation by Congress of the alcoholic content of beverages has demonstrated that adequate provisions for licensing and supervising the production of non-intoxicating malt or vinous liquors at the breweries or places of manufacture, and for licenses, stamps, labels and inspection certificates before shipment, could easily have been framed, as was done in respect of analogous subjects in the Food and Drug Act of Congress of June 30,

1906; the Meat Inspection Act of March 4, 1907; the Insecticide Act of April 26, 1910; the Plant Quarantine Act of August 20, 1912; the Pure Seed Act of August 24, 1912, and the Grain Standards Act of August 11, 1916.

If non-intoxicating beer, ale and porter may be prohibited, and even the use of their names made a criminal offense, because they look like intoxicating liquor, then grape juice, which looks like many kinds of wine, and syruped soda-water, nearly all the varieties of which look like some species of intoxicating liquors, may also be prohibited. It may be properly mentioned in this connection as a *reductio ad absurdum* that water looks like gin! It seems to be urged that it is merely a question of degree of regulation, and that the court ought not to override the judgment of Congress on any question of degree in the exercise of its constitutional powers. But the court is constantly called upon to determine just such questions of degree.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, principally relied on by the Government, is readily distinguishable if it be borne in mind that the state legislation then in question was enacted in the exercise of the unlimited police power of the State and that the legislation had been sustained by the highest court of the State as not prohibited by the state constitution.

The definition of intoxicating liquors as those containing one-half of one per cent. or more by volume of alcohol is arbitrary and contrary to conceded facts. This standard of alcoholic content originated for purposes of federal internal revenue taxation in connection with the Civil War Revenue Act of July 13, 1866, 14 Stat. 164, § 48, and was first adopted by the Treasury Department as a test of what should be deemed "fermented liquors" under taxing statutes. Treasury Decision Special No. 102, May 17, 1871; T. D. No. 804, June 29, 1904; T. D. No.

892, April 26, 1905; T. D. No. 1307, February 5, 1908; T. D. No. 1360, May 19, 1908; T. D. No. 2354, August 2, 1916; *United States* v. *Standard Brewery*, 251 U. S. 210, 219; P. O. Department Liquor Bulletin No. 2, June 15, 1917. States adopted the same standard as a matter of practical, convenient and economical administration. See, *e. g.*, New York Liquor Tax Law, § 2, subd. 6; Revised Code of Delaware, c. 6, Art. 11, § 137; Oregon General Laws of 1905, c. 2, § 18; Oklahoma Constitution, Prohibition Amendment of 1907. As state legislatures could, if they saw fit, prohibit not only intoxicating liquors but liquors containing no alcohol at all (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192), the present question could not arise.

The definition of an intoxicating liquor contained in § 1 of Title II of the National Prohibition Act is conceded on the record to be arbitrary and false, and it is not even attempted to be upheld as a definition. As declared by this court in *Eisner* v. *Macomber*, 252 U. S. 189, Congress cannot by any definition conclude the matter, since it cannot by legislation alter the Constitution or add to its powers. The authority conferred by the Amendment is not as to liquor in general but only as to "intoxicating liquors for beverage purposes." If Congress can under the guise of a definition or of appropriate enforcement legislation forbid the manufacture and sale of non-intoxicants as a State may under the doctrine of the *Purity Extract Co. Case*, it can likewise, under the plea that it deems it necessary, forbid the manufacture and sale of any liquor whatever, whether alcoholic or not, for medicinal, industrial, or sacramental purposes; for if one qualifying and limiting term, *i. e.*, "intoxicating," can be disregarded, the other qualifying term of the same nature and of no higher obligation, may also be deleted. Such a method of construing a constitutional provision is condemned by settled canons of constitutional interpretation, and more

important still is the fact that it would violate fundamental principles of honesty and good faith in public affairs.

Mr. Jackman for the appellee in No. 794, advanced the following propositions:

Neither Congress nor the several States have power to define "intoxicating liquor" under the Eighteenth Amendment.

Congress cannot under the enforcement clause enlarge the express grant of power so as to include beverages non-intoxicating in fact.

The State of Wisconsin having, under the power reserved and granted it by the Amendment, enacted legislation to enforce the prohibition, and not having concurred in the later congressional legislation, the act of Congress cannot be enforced and the state law overridden as to strictly intrastate transactions.

The Amendment is void because (a) it is not an amendment within the meaning of Article V, (b) it violates the Tenth Amendment.

Messrs. Houts, Fitzsimmons and *Crow*, for the appellant in No. 837, submitted, on the following main propositions:

The Amendment has not been ratified by three-fourths of the States.

It is invalid as an amendment, leading to the destruction of the system of dual sovereignties, and also as an attempt to exercise ordinary legislative power.

Under § 2 of the Amendment concurrence of the State is necessary to render the act of Congress effective as to internal transactions.

The National Prohibition Act is not appropriate legislation under the Amendment. (For the reasons stated in the other cases.)

350. Argument of Solicitor General and Asst. Attorney General.

The Amendment destroys appellant's property, existent before its adoption, and is therefore unconstitutional.

Argument of *The Solicitor General* and *Mr. Assistant Attorney General Frierson:*

The bills filed by the States of Rhode Island and New Jersey can not be maintained. They seek to enjoin officers of the Federal Government from enforcing criminal laws enacted by Congress. The sole ground upon which the original jurisdiction of this court can be invoked is that they involve controversies between a State and the citizens of other States. The fact that a State assumes to sue and names as defendants citizens of other States is not conclusive that this court must take jurisdiction. The judicial power of the United States over controversies to which a State is a party extends only to those cases "in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States." *United States* v. *Texas*, 143 U. S. 621, 644; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. A State can not invoke judicial action by making the case of its citizens its own and thus suing in vindication of grievances of particular individuals. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *South Dakota* v. *North Carolina*, 192 U. S. 286; *Louisiana* v. *Texas*, 176 U. S. 1, 16, 24–25.

The questions as to whether the Eighteenth Amendment is of such a nature as to be within the amending power provided by Article V of the Constitution, and whether the Eighteenth Amendment has, in fact, been ratified, are questions committed by the Constitution to the political branch and not to the judicial branch of the Government. *Luther* v. *Borden*, 7 How. 42–43, 45; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118; *Mississippi* v. *Johnson*, 4 Wall. 475; *Georgia* v. *Stanton*, 6 Wall. 50; *Field* v. *Clark*, 143 U. S. 649, 680; *Harwood* v. *Wentworth*,

162 U. S. 547, 562; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143; *Myers* v. *Anderson*, 238 U. S. 368, 373–374; 15 Stat. 707–711.

The Eighteenth Amendment, establishing a fundamental rule of law, is an amendment within the meaning of Article V of the Constitution. The Constitution and the amendments heretofore adopted are full of rules of law by which the activities of the various agencies of government, both state and federal, and the rights and duties of persons are fixed or regulated. The Thirteenth Amendment, particularly, is almost an exact prototype of the Eighteenth Amendment and operates upon individuals in the same way. It has always been understood that there is no limitation upon the character of amendments which may be adopted, except such limitations as are imposed by Article V itself. Washington's Writings, vol. XII, pp. 4–5, 222. With these specific limitations, whatever amendments or changes Congress may deem necessary to propose are incorporated in the Constitution if ratified in the manner provided by Article V. Gales and Seaton, Annals of Congress, vol. 1, p. 712.

The fact that the Eighteenth Amendment confers upon Congress a power which had previously belonged exclusively to the States does not prevent that Amendment from being within the amending power conferred by Article V of the Constitution. A provision to the effect that no State should, without its consent, "be affected in its internal police" by an amendment to the Constitution was twice proposed in the Convention and twice rejected. Elliot's Debates, vol. 1, pp. 316–317; Madison's Papers, pp. 531–532, 551–552. In scope, the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate. Willoughby on the Constitution, § 227. Many of the amendments heretofore adopted have taken away from the States powers previously reserved to them. This is particularly

true of the Thirteenth, Fourteenth and Fifteenth Amendments. *Minor* v. *Happersett*, 21 Wall. 162, 172.

No State by any provision of its laws or its constitution can make the ratification of an amendment to the Constitution of the United States by its legislature subject to a referendum vote of the people. The only method of ratification mentioned in the Constitution is through representatives assembled either in the legislature or a convention called for that purpose. It is clearly contemplated that the action of the State in ratifying shall not be by direct vote of the people but by their representatives, and the body, or bodies, who shall be recognized as acting for the States are specifically named. A legislature in ratifying an amendment, therefore, derives its power not from the State or the people of the State but from the people of the United States through the Constitution of the United States. This power can not be abrogated, limited, or restricted by any state statute or constitution, *Dodge* v. *Woolsey*, 18 How. 331, 348; *McPherson* v. *Blacker*, 146 U. S. 1, 34; Gales and Seaton, Annals of Congress, vol. 1, p. 716; *Davis* v. *Ohio*, 241 U. S. 565.

The Volstead Act, if otherwise constitutional, is effective in all the States without the concurrence of any state legislature. The effect of § 2 of the Eighteenth Amendment, providing that Congress and the several States shall have concurrent power to enforce the Amendment by appropriate legislation, enables Congress and the several state legislatures to enact such laws as they deem necessary to suppress the liquor traffic—the laws of Congress to be enforced through the courts of the United States, and the laws of each State to be enforced through its own courts. The provision is not that legislation shall be concurrent, but that the concurrent power to legislate shall exist. Congress and the several state legislatures may, therefore, legislate for the accomplishment of the same purpose, but independently of each other. *Fox* v.

Ohio, 5 How. 410, 418, 432; *Houston* v. *Moore*, 5 Wheat. 1, 47; *Prigg* v. *Pennsylvania*, 16 Pet. 536, 621; *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209, 211; *Passenger Cases*, 7 How. 282, 396; *United States* v. *Marigold*, 9 How. 559.

In order to enforce, with any degree of efficiency, the Eighteenth Amendment, a definition of intoxicating liquor was essential. The definition provided by the Volstead Act includes nothing which Congress could not properly deem necessary to enforce the provisions of the Amendment, and therefore is not arbitrary. *Crane* v. *Campbell*, 245 U. S. 304, 308; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Ruppert* v. *Caffey*, 251 U. S. 264.

The fact that by the passage of the Volstead Act on October 28, 1919, and the going into effect of the second title of that act and the Eighteenth Amendment on January 16, 1920, the sale of non-intoxicating beer containing as much as one-half of one per centum of alcohol was prohibited by the War Prohibition Act does not render Title II of the Volstead Act invalid, even as to the sale of such beer lawfully manufactured before October 28, 1919. *Mugler* v. *Kansas*, 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156–157; *Ruppert* v. *Caffey*, 251 U. S. 264.

The fact that the Amendment does not provide compensation for liquors previously manufactured does not render it invalid.

Mr. Justice Van Devanter announced the conclusions of the court.

Power to amend the Constitution was reserved by Article V, which reads:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legisla-

tures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The text of the Eighteenth Amendment, proposed by Congress in 1917 and proclaimed as ratified in 1919, 40 Stat. 1050, 1941, is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 83, 41 Stat. 305, which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases —Nos. 29 and 30, Original,—were brought in this court, and the others in district courts. Nos. 696, 752, 788 and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in

printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S. 276.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Hawke* v. *Smith, ante*, 221.

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every

legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, § 1), wherein liquors containing as much as one-half of one per cent. of alcohol by volume and fit for use for beverage

purposes are treated as within that power. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree is reversed.

In Nos. 696, 752, 788 and 837 the decrees are affirmed.

MR. CHIEF JUSTICE WHITE, concurring.

I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the Amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily, in doing this I notice various contentions made concerning the proper construction of the provisions of the Amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the Amendment.

The Amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into,

or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The second is as follows: "Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the States in enforcing the prohibition of the first section and hence that in the absence of such concurrent action by Congress and the States no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second, to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as practically to nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the States does not as a prerequisite exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the States and makes each action effective, but, as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the States in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged, because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent powers con-

ferred upon Congress and the States are not subject to conflict because their exertion is authorized within different areas, that is, by Congress within the field of federal authority, and by the States within the sphere of state power, hence leaving the States free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress, the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a State, since the basis of the distinction upon which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction and therefore is not operative within a State.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead serve in my judgment to make it certain that it cannot possibly be that Congress and the States entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true, indeed, that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the Amendment dealt and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is undisputable, as I have stated,

that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to State and Nation is, not to construct or perfect or cause the Amendment to be completely operative, but as already made completely operative, to enforce it. Observe also the words of the grant which confine the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist no one would gainsay that the first section in and of itself granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the Amendment would become fully operative. This being

true it would follow, if the contentions under consideration were sustained, that the second section gave the States the power to nullify the first section, since a refusal of a State to define and sanction would again result in no amendment to be enforced in such refusing State.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the States to give effect to, that is, to carry out or enforce, the Amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice McReynolds, concurring.

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances, I prefer to remain free to consider these questions when they arrive.

Mr. Justice McKenna, dissenting.

These cases are concerned with the Eighteenth Amendment of the Constitution of the United States, its validity and construction. In order to have it, and its scope in attention, I quote it:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The court in applying it has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgments reversing No. 794 and affirming Nos. 696, 752, 788 and 837.

I am, however, at a loss how, or to what extent, to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the Eighteenth Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and as part of the Constitution of the United States is to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5 and 6, seem to assert the undisputed. I neither assent to them nor dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration. My only comment is that I know of no

intimation in the case that § 2, in conferring concurrent power on Congress and the States to enforce the prohibition of the first section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition and was made concurrent to engage the resources and instrumentalities of the Nation and the States. The power was conferred for use, not for abuse.

Conclusions 8 and 9 as I view them, are complements of each other, and express, with a certain verbal detail, the power of Congress and the States over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the States, its exportation from them, and its importation into them—in a word, give power over the liquor business from producer to consumer and to prescribe the quality of the latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of § 2 do not mean joint power in Congress and the States, nor the approval by the States of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts?—and there are conflicts, and more there may be, between it and state legislation. The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered, States are litigants as well as private citizens, the former presenting the rights of the States, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state legislation,—why not a deci-

sion upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the States, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the States being supreme and exclusive within the spheres of their exercise—called by counsel "historical fields of jurisdiction." I submit again, they should have consideration and decision.

The Government has felt and exhibited the necessity of such consideration and decision. It knows the conflicts that exist or impend. It desires to be able to meet them, silence them and bring the repose that will come from a distinct declaration and delimitation of the powers of Congress and the States. The court, however, thinks otherwise, and I pass to the question in the case. It is a simple one, it involves the meaning of a few English words —in what sense they shall be taken, whether in their ordinary sense, or have put upon them an unusual sense.

Recurring to the first section of the Amendment, it will be seen to be a restriction upon state and congressional power, and the deduction from it is that neither the States nor Congress can enact legislation that contravenes its prohibition. And there is no room for controversy as to its requirement. Its prohibition of "intoxicating liquors" "for beverage purposes" is absolute. And, as accessory to that prohibition, there is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation from "the United States." Its prohibition, therefore, is National, and, considered alone, the means of its enforcement might be such as Congress, the agency of National power, might

prescribe. But it does not stand alone. Section 2 associates Congress and the States in power to enforce it. Its words are, "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

What then is meant by the words "concurrent power"? Do they mean united action, or separate and independent action; and, if the actions differ (there is no practical problem unless they differ), shall that of Congress be supreme?

The Government answers that the words mean separate and independent action, and, in case of conflict, that that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents.[1] I contest the assertions and oppose to them the common usage of our language, and the definitions of our lexicons,

[1] The following is the contention of the Government which I give to accurately represent it: "It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means, in other connections, a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections, it has a well-fixed and established meaning, which is controlling in this case."

And again, "It is to be noted that section 2 does not say that *legislation shall be concurrent*, but that the *concurrent power* to legislate shall exist. The concurrent power of the States and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers, in referring to the concurrent power of Congress and the States to legislate."

And after citing cases, the Government says: "It will thus be seen that in legal nomenclature the concurrent power of the States and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject-matter separately and independently."

general and legal.[1] Some of the definitions assign to the words "concurrent power," action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance. Such is the result of the Government's contention. It does not satisfy the definitions, or the requirement of § 2—"a concurrent power excludes the idea of a dependent power," Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 399.

Other definitions assign to the words, "existing or happening at the same time," "concurring together," "coexistent." These definitions are, as the others are, inconsistent with the Government's contention. If coexistence of the power of legislation is given to Congress and the States by § 2, it is given to be coexistently exercised. It is to be remembered that the Eighteenth Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation. It was naturally thought that legislation enacted by "the Congress and the several States," by its concurrence would better enforce prohibition and avail for its enforcement of the two great divisions of our governmental system,

[1] Definitions of the dictionaries are as follows: The Century: "Concurrent: **2. Concurring, or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident. 3. Conjoint; joint; concomitant; coördinate; combined.** That which concurs; a joint or contributory thing." Webster's first definition is the same as that of the Century. The second is as follows: "Conjoint; associate; concomitant; existing or happening at the same time."

the Nation and the States, with their influences and instrumentalities.

From my standpoint, the exposition of the case is concluded by the definition of the words of § 2. There are, however, confirming considerations; and militating considerations are urged. Among the confirming considerations are the cases of *Wedding* v. *Meyler*, 192 U. S. 573, and *Nielsen* v. *Oregon*, 212 U. S. 315, in which "concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by act of Congress. And it was decided that the jurisdiction given conferred equality of powers, "legislative, judicial and executive," and that neither State could override the legislation of the other. Other courts have given like definitions. 2 Words and Phrases Judicially Defined, 1391, *et seq.*, Bouvier's Dictionary, vol. 1, p. 579. Analogy of the word "concurrent" in private instruments may also be invoked.

Those cases are examples of the elemental rule of construction that, in the exposition of statutes and constitutions, every word "is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it," and there cannot be imposed upon the words "any recondite meaning or any extraordinary gloss." 1 Story, Const., § 451; *Lake County* v. *Rollins*, 130 U. S. 662. And it is the rule of reason as well as of technicality, that if the words so expounded be "plain and clear, and the sense distinct and perfect arising on them" interpretation has nothing to do. This can be asserted of § 2. Its words express no "double sense," and should be accepted in their single sense. It has not yet been erected into a legal maxim of constitutional construction, that words were made to conceal thoughts. Besides, when we depart from the words, ambiguity comes. There are as many solutions

as there are minds considering the section, and out of the conflict, I had almost said chaos, one despairs of finding an undisputed meaning. It may be said that the court, realizing this, by a declaration of conclusions only has escaped the expression of antithetical views, considering it better not to blaze the trails, though it was believed that they all led to the same destination.

If it be conceded, however, that to the words "concurrent power" may be ascribed the meaning for which the Government contends, it certainly cannot be asserted that such is their ordinary meaning, and I might leave § 2, and the presumptions that support it, to resist the precedents adduced by the Government. I go farther, however, and deny the precedents. The Federalist and certain cases are cited as such. There is ready explanation of both, and neither supports the Government's contention. The dual system of government contemplated by the Union encountered controversies, fears, and jealousies that had to be settled or appeased to achieve union, and the Federalist in good and timely sense explained to what extent the "alienation of State sovereignty" would be necessary to "National sovereignty," constituted by the "consolidation of the States," and the powers that would be surrendered, and those that would be retained. And the explanation composed the controversies and allayed the fears of the States that their local powers of government would be displaced by the dominance of a centralized control. And this court, after Union had been achieved, fulfilled the assurances of the explanation and adopted its distribution of powers, designating them as follows: (1) Powers that were exclusive in the States—reserved to them; (2) Powers that were exclusive in Congress, conferred upon it; (3) Powers that were not exclusive in either, and hence said to be "concurrent." And it was decided that, when exercised by Congress, they were supreme—"The authority of the States then retires" to inaction.

To understand them, it must be especially observed that their emphasis was, as the fundamental principle of the new government was, that it had no powers that were not conferred upon it, and that all other powers were reserved to the States. And this necessarily must not be absent from our minds, whether construing old provisions of the Constitution or amendments to it or laws passed under the amendments.

The Government nevertheless contends that the decisions (they need not be cited) constitute precedents for its construction of § 2 of the Eighteenth Amendment. In other words, the Government contends (or must so contend for its reasoning must bear the test of the generalization) that it was decided that in all cases where the powers of Congress are concurrent with those of the States, they are supreme as incident to concurrence. The contention is not tenable; it overlooks the determining consideration. The powers of Congress were not decided to be supreme because they were concurrent with powers in the States, but because of their source, their source being the Constitution of the United States, as against the source of the powers of the States, their source being the constitutions of the States, the Constitution and laws of the United States being made by Article VI the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 426.

This has example in other powers of sovereignty that the States and Congress possess. In *McCulloch* v. *Maryland*, at pages 425, 430, Chief Justice Marshall said that the power of taxation retained by the States was not abridged by the granting of a similar power to the Government of the Union, and that it was to be concurrently exercised, and these truths, it was added, had never been denied, and that there was no "clashing sovereignty" from incompatibility of right. And necessarily; a con-

currence of power in the States and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that § 2, by giving concurrent power to Congress and the States, gave Congress supreme power over the States. I repeat the declaration of Mr. Justice McLean: "A concurrent power excludes the idea of a dependent power."

It is, however, suggested (not by the Government) that if Congress is not supreme upon the considerations urged by the Government, it is made supreme by Article VI of the Constitution. The Article is not applicable. It is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the constitutions and laws of the States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 209, 211; 2 Story, Const., 5th ed., § 1838, *et seq.*

The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as Article VI. There seems to be a denial of this, based on Article V. That Article provides that the amendments proposed by either of the ways there expressed "shall be valid to all Intents and Purposes, as Part of this Constitution." Some undefinable power is attributed to this in connection with Article VI, as if Article V limits in some way, or defeats, an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have? And it would be nullified by the mythical power attributed to Article V, either alone or in conjunction with Article VI. A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it. Section 2, therefore, is a new provision of power, power to the

States as well as to Congress, and it is a contradiction to say that a power constitutionally concurrent in Congress and the States, in some way becomes constitutionally subordinate in the States to Congress.

If it be said that the States got no power over prohibition that they did not have before, it cannot be said that the power already possessed was not preserved to them by the Amendment, notwithstanding the policy of prohibition was made national; and besides, there was a gift of power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the States should remain with the States and be participated in by Congress only in concurrence with the States, and thereby preserved from abuse by either, or exercise to the detriment of prohibition. There was, however, a power given to the States, a power over importations. This power was subject to concurrence with Congress and had the same safeguards.

This construction of § 2 is enforced by other considerations. If the supremacy of Congress had been intended, it would have been directly declared as in the Thirteenth, Fourteenth and Fifteenth Amendments. And such was the condition when the Amendment left the Senate. The precedent of preceding amendments was followed, there was a single declaration of jurisdiction in Congress.

Section 2 was amended in the House upon recommendation of the Judiciary Committee, and the provision giving concurrent power to Congress and to the States was necessarily estimated and intended to be additive of something. The Government's contention makes it practically an addition of nothing but words, in fact denuding it of function, making it a gift of impotence, not one of power to be exercised independently of Congress or concurrently with Congress, or, indeed, at all. Of this there can be no contradiction, for what power is assigned to the States to legislate if the legislation be immediately

superseded—indeed, as this case shows, be possibly forestalled and precluded by the power exercised in the Volstead Act? And meaningless is the difference the Government suggests between concurrent power and concurrent legislation. A power is given to be exercised, and we are cast into helpless and groping bewilderment in trying to think of it apart from its exercise or the effect of its exercise. The addition to § 2 was a conscious adaptation of means to the purpose. It changed the relation between the States and the National Government. The lines of exclusive power in one or the other were removed, and equality and community of powers substituted.

There is a suggestion, not made by the Government, though assisting its contention, that § 2 was a gift of equal power to Congress and to the States, not, however, to be concurrently exercised, but to be separately exercised; conferred and to be exercised, is the suggestion, to guard against neglect in either Congress or the States, the inactivity of the one being supplied by the activity of the other. But here again we encounter the word "concurrent" and its inexorable requirement of coincident or united action, not alternative or emergency action to safeguard against the delinquency of Congress or the States. If, however, such neglect was to be apprehended, it is strange that the framers of § 2, with the whole vocabulary of the language to draw upon, selected words that expressed the opposite of what the framers meant. In other words, expressed concurrent action instead of substitute action. I cannot assent. I believe they meant what they said and that they must be taken at their word.

The Government with some consciousness that its contention requires indulgence or excuse, at any rate in recognition of the insufficiency of its contention to satisfy the words of § 2, makes some concessions to the States. They are, however, not very tangible to measurement. They seem to yield a power of legislation to the States

and a power of jurisdiction to their courts, but, almost at the very instant of concession, the power and jurisdiction are declared to be without effect.

I am not, therefore, disposed to regard the concessions seriously. They confuse; "make no light; but rather darkness visible." Of what use is a concession of power to the States to enact laws which cannot be enforced? Of what use a concession of jurisdiction to the courts of the States when their judgments cannot be executed, indeed the very law upon which it is exercised may be declared void in an antagonistic jurisdiction exerted in execution of an antagonistic power? [1] And equally worthless is the analogy that the Government assays between the power of the National Government and the power of the States to criminally punish violations of their respective sovereignties, as for instance in counterfeiting cases. In such cases the exercises of sovereignty are not in antagonism. Each is inherently possessed and independently exercised, and can be enforced no matter what the other sovereignty may do or abstain from doing. On the other hand, under the Government's construction of § 2, the legislation of Congress is supreme and exclusive. Whatever the States may do is abortive of effect.

The Government, seeking relief from the perturbation of mind and opinions produced by departure from the words of § 2, suggests a modification of its contention that in case of conflict between state legislation and congres-

[1] The Government feels the inconsistency of its concessions and recessions. It asserts at one instant that the legislation of the States may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the federal courts for the same act as a violation of the federal law. From this situation the Government hopes that there will be rescue by giving the Eighteenth Amendment "such a meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offense in the courts of the other." The Government considers, however, the question is not now presented.

sional legislation that of Congress would prevail, by intimating that, if state legislation be more drastic than congressional legislation, it might prevail; and, in support of the suggestion, urges that § 1 is a command to prohibition, and that the purpose of § 2 is to enforce the command, and whatever legislation is the most prohibitive subserves best the command, displaces less restrictive legislation and becomes paramount. If a State, therefore, should define an intoxicating beverage to be one that has less than one-half of one per cent. of alcohol, it would supersede the Volstead Act, and a State might even keep its legislation supreme by forestalling congressional retaliation by prohibiting all artificial beverages of themselves innocuous, the prohibition being accessory to the main purpose of power,—adducing *Purity Extract Co.* v. *Lynch*, 226 U. S. 192. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264. Of course this concession to the more drastic legislation destroys all that is urged for congressional supremacy; for necessarily supremacy cannot be transferred from the States to Congress or from Congress to the States as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" and declares that "those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the States as well.

From these premises the deduction seems inevitable that there must be united action between the States and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the Amendment—will it not bring to the enforcement of prohibition the power of the States and the power of

Congress, make all the instrumentalities of the States, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its courts and officers, agencies of the enforcement? Will it not bring to the States as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections?—and it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so, sacrifices nothing of the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the Amendment, for without legislation its prohibition would be ineffectual; and that it is impossible to secure the concurrence of Congress and the States in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the Amendment,—will impel its execution through Congress and the States. It may not be in such legislation as the Volstead Act with its ½ of 1% of alcohol, or in such legislation as some of the States have enacted with their 2.75% of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement, in view of the requirement of § 2, it may be answered as this court answered in *Wedding* v. *Meyler*, *supra*, "The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but, in relief of the solitude of my position, I invoke the coincidence of my views with

those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

MR. JUSTICE CLARKE, dissenting.

I concur in the first seven paragraphs and in the tenth paragraph of the announced "conclusions" of the court, but I dissent from the remaining three paragraphs.

The eighth, ninth and eleventh paragraphs, taken together, in effect, declare the Volstead Act to be the supreme law of the land,—paramount to any state law with which it may conflict in any respect.

Such a result, in my judgment, can be arrived at only by reading out of the second section of the Eighteenth Amendment to the Constitution the word "concurrent," as it is used in the grant to Congress and the several States of "concurrent power to enforce this article by appropriate legislation." This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this court,—that in expounding the Constitution of the United States no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word to the extent that this is reasonably possible.

This rule was first announced in 1824 in *Gibbons* v. *Ogden*, 9 Wheat. 1; it was applied with emphasis in 1840 in *Holmes* v. *Jennison*, 14 Pet. 540, 570; and in the recent case of *Knowlton* v. *Moore*, 178 U. S. 41, it is referred to as an elementary canon of constitutional construction.

The authoritative dictionaries, general and law, and the decided cases, agree, that "concurrent" means "joint and equal authority", "running together, having the same

authority," and therefore the grant of concurrent power to the Congress and the States should give to each equal,—the same,—authority to enforce the Amendment by appropriate legislation. But the conclusions of the court from which I dissent, by rendering the Volstead Act of Congress paramount to state laws, necessarily deprive the States of all power to enact legislation in conflict with it, and construe the Amendment precisely as if the word "concurrent" were not in it. The power of Congress is rendered as supreme as if the grant to enforce the Amendment had been to it alone, as it is in the Thirteenth, Fourteenth and Fifteenth Amendments and as it was in one proposed form of the Eighteenth Amendment which was rejected by Congress. Cong. Rec., July 30, 1917, p. 5548, and December 17, 1917, p. 469.

Such a construction should not be given the Amendment if it can reasonably be avoided, as it very clearly may be, I think, with a resultant giving of a large and beneficent effect to the grant, as it is written. Giving to the word "concurrent" its usual and authoritative meaning, would result in congressional legislation under this grant of power being effective within the boundaries of any State only when concurred in by action of Congress and of such State, which, however, could readily be accomplished by the approval by either of the legislation of the other or by the adoption of identical legislation by both. Such legislation would be concurrent in fact and in law and could be enforced by the courts and officers of either the Nation or the State, thereby insuring a more general and satisfactory observance of it than could possibly be obtained by the federal authorities alone. It would, to a great extent, relieve Congress of the burden and the general government of the odium to be derived from the antagonism which would certainly spring from enforcing, within States, federal laws which must touch the daily life of the people very intimately and often very irritatingly.

Such coöperation in legislation is not unfamiliar to our Constitution or in our practical experience.

By § 10 of Art. I of the Constitution of the United States the States are deprived of power to do many things without the consent of Congress, and that consent has frequently been given, especially to contracts and agreements between States, which without it would be unconstitutional and void. The Wilson Act of 1890, the Webb-Kenyon Act of 1913, and the Reed Amendment of 1917 are familiar examples of coöperative legislation on the subject of intoxicating liquors. Other instances could readily be supplied. When to this we add that the Volstead Act is obviously in very large part a compilation from the prohibition codes of various States and is supposed to contain what is best in each of them, there is every reason to believe that, if concurrent legislation were insisted upon, the act would be promptly approved by the legislatures of many of the States and would thereby become the concurrent law of the State and Nation throughout a large part of the Union.

Under this construction, which I think should be given the Amendment, there would be large scope also for its operation even in States which might refuse to concur in congressional legislation for its enforcement. In my judgment, the law in such a State would be as if no special grant of concurrent power for the enforcement of the first section had been made in the second section, but, nevertheless, the first section, prohibiting the manufacture, sale, transportation, importation or exportation, of intoxicating liquors for beverage purposes, would be the supreme law of the land within the non-concurring States and they would be powerless to license, tax, or otherwise recognize as lawful anything violating that section, so that any state law in form attempting such recognition would be unconstitutional and void. Congress would have full power under the interstate commerce clause,

and it would be its duty, to prevent the movement of such liquor for beverage purposes into or out of such a State and the plenary police power over the subject, so firmly established in the States before the Eighteenth Amendment was adopted, would continue for use in the restricted field which the first section of the Amendment leaves unoccupied,—and the presumption must always be indulged that a State will observe and not defy the requirements of the National Constitution.

Doubtless such a construction as I am proposing would not satisfy the views of extreme advocates of prohibition or of its opponents, but in my judgment it is required by the salutary rule of constitutional construction referred to, the importance of which cannot be overstated. It is intended to prevent courts from re-writing the Constitution in a form in which judges think it should have been written instead of giving effect to the language actually used in it; and very certainly departures from it will return to plague the authors of them. It does not require the eye of a seer to see contention at the bar of this court against liberal, paramount, congressional definition of intoxicating liquors as strenuous and determined as that which we have witnessed over the strict definition of the Volstead Act.

With respect to the 11th conclusion of the court, it is enough to say that it approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered. This is deemed warranted, I suppose, as legislation appropriate to the enforcement of the first section, and precedent is found for it in prohibition legislation by States. But I cannot agree that the prohibition of the manufacture, sale, etc., of intoxicating liquors in the first section of the Eighteenth Amendment gives that plenary power over the subject which the legislatures of the States derive from the people or which may be derived from the war powers

of the Constitution. Believing, as I do, that the scope of the first section cannot constitutionally be enlarged by the language contained in the second section, I dissent from this conclusion of the court.

In the *Slaughter-House* [16 Wall. 36], and other cases, this court was urged to give a construction to the Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of our state and federal governments by transferring to the general government that police power, through the exercise of which the people of the various States theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its varieties of climate, of industry and of habits of the people. But this court, resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government, in a number of decisions which came to command the confidence of the generation active when they were rendered and which have been regarded by our succeeding generation as sound and wise and highly fortunate for our country.

The cases now before us seem to me to again present questions of like character to, and of not less importance than, those which were presented in those great cases, and I regret profoundly that I cannot share in the disposition which the majority of my associates think should be made of them.